(10)

No. 84-835-CFH
Status: GRANTED

Title: New Jersey Department of Corrections, Petitioner
v.
Richard Nash

Docketed:
November 20, 1984

Court: United States Court of Appeals
for the Third Circuit

Vide:
84-776

Counsel for petitioner: Ciancia, James J.

Counsel for respondent: De Julio, Lois

Entry	Date	Note	Proceedings and Orders
1	Nov 20 1984	G	Petition for writ of certiorari filed.
3	Dec 3 1984		Order extending time to file response to petition until December 20, 1984.
4	Dec 19 1984		DISTRIBUTED. January 11, 1985
5	Dec 26 1984	X	Brief amicus curiae of Pennsylvania, et al. filed.
6	Dec 17 1984	X	Brief of respondent Richard Nash in opposition filed.
7	Dec 17 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Jan 14 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Powell OUT.
10	Jan 14 1985		Petition GRANTED. This case is consolidated with case No. 84-776, and a total of one hour is allotted for oral argument. Justice Powell OUT.
			**********
11	Feb 27 1985		Joint appendix filed. VIDED.
12	Feb 27 1985		Brief of petitioner Philip S. Carchman filed. VIDED.
13	Mar 1 1985		Brief of petitioner NJ Dept. of Corr. filed.
14	Mar 1 1985		Record filed.
15	Mar 1 1985		Certified copy of joint briefs and appendix together with partial proceedings received.
16	Mar 1 1985		Brief amicus curiae of Pennsylvania, et al. filed. VIDED.
17	Mar 8 1985	D	Motion of petitioners for divided argument filed.
18	Mar 18 1985		Motion of petitioners for divided argument DENIED. Justice Powell OUT.
19	Mar 25 1985		SET FOR ARGUMENT, Monday, April 22, 1985. This case is consolidated with case no. 84-776. (2nd case) (1 hour).
20	Mar 28 1985	G	Motion of respondent to permit John Burke III, Esquire, to present oral argument pro hac vice filed.
21	Apr 2 1985		Brief of respondent Richard Nash filed. VIDED.
22	Apr 1 1985		CIRCULATED.
23	Apr 6 1985		Record filed.
24	Apr 4 1985	X	Brief amicus curiae of University of VA Post Conviction Assistance filed. VIDED.
25	Apr 15 1985		Motion of respondent to permit John Burke III, Esquire, to present oral argument pro hac vice GRANTED.
26	Apr 22 1985		ARGUED.

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84-835

No. _____

In The

Supreme Court of the United States

October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals erred in ruling, in contravention to every other court which has considered the issue, that Article III of the Interstate Agreement on Detainers, an interstate compact entered into by 48 states, the federal government and the District of Columbia, applies to a detainer based upon a charge of probation violation?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Phillip Carchman, appellant below

State of New Jersey, Department of Corrections, petitioner herein; intervenor below

Richard Nash, appellee below

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JURISDICTION

The judgment of the Third Circuit Court of Appeals was filed July 10, 1984 (App. 105 to App. 106). A timely petition for rehearing with a suggestion for rehearing *in banc* was denied August 27, 1984 (App. 103 to App. 104). Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to

*Refers to Appendix filed simultaneously with petition submitted by co-petitioner, Philip S. Carchman.

trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. [*N.J.S.A.* 2A:159A-3(a)]

———o———

STATEMENT OF THE CASE

Richard Nash was serving a New Jersey sentence of probation for the crime of breaking and entering with intent to rape when he was convicted in Pennsylvania and sentenced to a term of imprisonment for the crimes of burglary, involuntary deviant sexual intercourse and loitering (App. 4). Because Nash committed a new crime while on probation, the New Jersey county probation office which was supervising Nash lodged a probation violation warrant as a detainer with the Pennsylvania prison authorities (App. 4).

Nash subsequently attacked the legality of the detainer lodged against him, claiming that New Jersey was without power to revoke his probation, notwithstanding his commission of a new crime, because the county authorities

failed to give him a probation violation hearing within the time period prescribed in Article III of the Interstate Agreement on Detainers (hereafter referred to as IAD). *N.J.S.A.* 2A:159A-3(a).

Nash initially filed a petition for habeas corpus in federal court pursuant to 28 *U.S.C.* § 2254 (App. 6). The petition was dismissed for failure to exhaust available state remedies (App. 6; App. 95 to App. 97). In state court, the trial court rejected Nash's claim that the Interstate Agreement on Detainers applied to a detainer based upon a charge of probation violation. The trial court revoked Nash's probation and imposed an aggregate three-year probation violation term to be served consecutively to his Pennsylvania sentence. (App. 6; App. 51 to App. 80). On appeal, the state appellate court affirmed and the New Jersey Supreme Court denied certification (App. 6; App. 43 to App. 50).

Nash then refiled his habeas petition in federal court. The district judge ruled that the Interstate Agreement on Detainers included within its scope detainers lodged on the basis of a charge of probation violation. (App. 6 to App. 7; App. 21 to App. 42). The court also ruled that Nash had properly invoked the provisions of the IAD, even though he did not comply with the application procedures set forth in the Agreement (App. 6 to App. 7; App. 21 to App. 42). *See also N.J.S.A.* 2A:159A-3. Since New Jersey failed to conduct a probation violation hearing within the 180 day period indicated in Article III, *N.J.S.A.* 2A:159A-3(a), the federal court vacated Nash's probation violation sentence and ordered Nash's release from state custody (App. 4; App. 43).

The Third Circuit Court of Appeals affirmed the district court's ruling. Based upon its independent policy

analysis, the Third Circuit panel concluded that the benefit to the prisoner of expanding the applicable scope of the IAD to probation violation detainers outweighed any insuing burden to the charging state (App. 1 to App. 18). A petition for rehearing with a suggestion that the matter be reheard *in banc* was denied (App. 103 to App. 104).

This petitioner, the New Jersey Department of Corrections, was given leave to intervene by the Third Circuit on the side of the appellant, the Mercer County Prosecutor (App. 18 to App. 20). While the Commissioner of Corrections does not supervise probationers in New Jersey, he has legal custody of and supervision over all parolees released from the New Jersey state prison system. *N.J.S.A.* 30:4-123.59(a). Intervention was also sought because the district court's ruling in *Nash* effectively invalidated the Department's policy that parole or probation violation detainers do not fall within the scope of the IAD. See Department of Corrections Standard 867.D (App. 106 to App. 109) (unpublished regulation) (hereafter referred to as D.O.C. Std.)

The district court had subject matter jurisdiction over the instant action pursuant to 28 *U.S.C.* § 2241 and 28 *U.S.C.* § 2254. The Third Circuit had jurisdiction to review a final judgment pursuant to 28 *U.S.C.* § 1291. The Department submits that the Court should review the matter as the Third Circuit's ruling in *Nash* conflicts with the hitherto uniform and longstanding construction of an interstate agreement and because the issue of the interpretation of the applicable scope of the IAD presents an important question of federal law which should be settled by the Court. *Sup. Ct. R.* 17(a); (c).

REASONS FOR GRANTING THE WRIT

This Court Should Grant The Writ In Order To Finally And Authoritatively Resolve The Conflict Created By The Decision Below.

The Interstate Agreement on Detainers is an interstate compact currently entered into by 48 states, the District of Columbia and the Federal Government. Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers,* 83 Colum. L. Rev. 975, 975 n.1 (1983). The Agreement's provisions are interpreted as a matter of federal law. *Cuyler v. Adams,* 449 *U.S.* 433 (1981).

The IAD provides a mechanism which permits the temporary interstate transfer of custody of a prisoner for the purpose of disposing of a detainer based upon an untried indictment, information or complaint. *N.J.S.A.* 2A:159A-1; 2A:159A-3(a). Pursuant to Article III, a request to dispose of such a charge may be made by the prisoner who is subject to the detainer. *N.J.S.A.* 2A:159A-3(a). Whenever a prisoner properly invokes Article III, the underlying charges must be resolved by the charging state within 180 days of its receipt of notice of the request. *N.J.S.A.* 2A:159A-3(a). Failure of the charging state to dispose of the pending charge within the time period mandated by the IAD requires a dismissal of the charge with prejudice. *N.J.S.A.* 2A:159A-3(d).

(a) Certiorari should be granted to resolve the legal conflict created by the Third Circuit's ruling.

The Third Circuit Court of Appeals ruled that the phrase "untried indictment, information or complaint" in

Article III of the IAD applied to a detainer based upon a charge of probation violation. *Nash v. Jeffes,* 739 *F.*2d 878 (3rd Cir. 1984) (App. 1 to App. 18) *reh'g denied* (August 27, 1984) (App. 103 to App. 104). *See N.J.S.A.* 2A: 159A-3(a). This ruling is in conflict with every other court which has addressed the issue, including a federal circuit court, *Hopper v. U.S. Parole Comm'n,* 702 *F.*2d 842 (9th Cir. 1983); two federal district courts, *Hernandez v. United States,* 527 *F.Supp.* 83 (W.D. Okla. 1981), *Sable v. Ohio,* 439 *F.Supp.* 905 (W.D. Okla. 1977); three state supreme courts, *Padilla v. Arkansas,* 279 *Ark.* 100, 648 *S.W.*2d 797 (1983), *Suggs v. Hopper,* 234 *Ga.* 242, 215 *S.E.*2d 246 (1975); *State v. Knowles,* 275 *S.C.* 312, 270 *S.E.*2d 133 (1980), and nine state appellate courts, *Irby v. Missouri,* 427 *So.*2d 367 (Fla. App. 1983) *overruling Gaddy v. Turner,* 376 *So.*2d 1225 (Fla. App. 1979), *Cart v. DeRobertis,* 453 *N.E.*2d 153 (Ill. App. Ct. 1983), *People v. Jackson,* 626 *P.*2d 723 (Colo. App. 1981), *Maggard v. Wainwright,* 411 *So.*2d 200 (Fla. App. 1982), *Wainwright v. Evans,* 403 *So.*2d 1123 (Fla. App. 1981), *Buchanan v. Mich. Dept. of Corrections,* 50 *Mich. App.* 1, 212 *N.W.*2d 745, (Mich. Ct. App. 1973), *People ex rel. Capalongo v. Howard,* 87 *App. Div.* 2d 242, 453 *N.Y.S.*2d 45 (N.Y. App. Div. 1982), *People v. Batalias,* 35 *App. Div.* 2d 740, 316 *N.Y.S.*2d 245 (N.Y. App. Div. 1970), *Blackwell v. State,* 546 *S.W.*2d 828 (Tenn. Crim. App. 1976). Of the fifteen cases decided prior to *Nash,* seven courts ruled that Article III of the IAD did not apply to probation violation detainers, *Padilla v. Arkansas, supra; Suggs v. Hopper, supra; State v. Knowles, supra; People v. Jackson, supra; People ex rel. Capalongo v. Howard, supra; People v. Batalias, supra* and *Blackwell v. State, supra.* Eight courts ruled that Article III of the

IAD did not apply to parole violation detainers, *Hopper v. U.S. Parole Comm'n, supra; Sable v. Ohio, supra; Hernandez v. United States, supra; Irby v. Missouri, supra; Cart v. DeRobertis, supra; Maggard v. Wainwright, supra; Wainwright v. Evans, supra* and *Buchanan v. Michigan Dept. of Corrections, supra.*

The Third Circuit was unimpressed by the reasoning of these fifteen courts, preferring instead the analysis of the district court in *Nash,* which it characterized as "considerably more comprehensive than that of any of the courts which have dealt with the issue previously." (App. 8). The district court's statutory analysis included an examination of New Jersey legislative history, which it did not find helpful, and an examination of the commentary generated by the Council of State Governments. *Nash v. Carchman,* 558 *F.Supp.* 641, 643-645, (D.N.J. 1983) (App. 21) *aff'd sub nom Nash v. Jeffes,* 739 *F.*2d 878 (3rd Cir. 1984) (App. 1) *reh'g denied* (August 27, 1984) (App. 103 to App. 104). The district court found the following comment by the Council on State Governments to be dispositive on the question of the type of detainers to which the IAD was meant to apply:

> Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or *a parolee commits a new crime and is imprisoned in another state.* [*Nash, supra,* 558 *F. Supp.* at 645 (emphasis in opinion) (quoting Council of State Government, Suggested State Legislation for 1957 at 74 (1956)) (App. 28)].

The sentence quoted by the district court is contained in a longer paragraph which, when set out in full, reads:

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of in-

> suring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. *Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state;* or where a man not previously imprisoned commits a series of crimes in different jurisdictions. [Council of State Governments, Suggested State Legislation for 1957 at 74 (1956) (emphasis added; indicating material quoted by the district court)].

The commentary which is the keystone of the district court's analysis does not refer at all to the scope of the applicability of the IAD, but merely defines in a general way what a detainer is. The quoted commentary, accordingly, provides no support at all for the district court's ruling that the IAD applies to probation violation detainers. Manifestly, the district court's analysis is not more comprehensive than the fifteen other courts which addressed the issue.

Essentially, the Third Circuit rejected the unanimous judicial construction of the applicable scope of the IAD because it believed that early adjudication of a detainer based upon probation violation charge was a salutary policy goal which promoted the rehabilitation of a prisoner. (App. 8 to App. 13; *see also* App. 9 at n.7 and App. 13 at n.9). The court's policy analysis, however, is flawed.

The fundamental assumption underlying the court's analysis is that a prisoner subject to a detainer based upon a charge of probation violation can reasonably expect to have the pending probation violation charge resolved in

his favor. (*See* App. 12). The Third Circuit believed the prisoner, therefore, should be able to invoke Article III and compel an early adjudication of his probation violation charge because, if and when the charge was resolved in the prisoner's favor, the detainer against him would be lifted and he would then be able to participate fully in the rehabilitation programs offered by the state in which he was incarcerated. (App. 12).

It is unlikely, however, that early adjudication of a probation violation charge lodged because the prisoner committed a crime while on probation will result in a dismissal of the charge. The issue of factual guilt of the violation is conclusively established when one commits a new crime while on parole or probation. *See Morrissey v. Brewer,* 408 *U.S.* 471, 490 (1972) (issue of factual guilt of new crime committed while on parole cannot be relitigated at a parole revocation hearing). *See also State v. Serio,* 168 *N.J. Super.* 394, 396 (Law Div. 1979) (issue of factual guilt of new crime committed while on probation cannot be relitigated at a probation revocation hearing.) Given this legal standard, it is often, as the Court recognized in *Moody v. Daggett,* 429 *U.S.* 78 (1976), in the prisoner's interest to delay a parole or probation revocation hearing for as long as possible, because in the interim the prisoner may establish circumstances, such as a good institutional record or parole plan, which might rebut the presumption of revocation.* *Moody v. Daggett, supra,* 429 *U.S.* 78, 89.

*Under New Jersey parole law, parole must be revoked whenever a parolee commits a new crime while on parole, unless the parolee can establish mitigating circumstances, unrelated to the commission of the offense, which would militate against a revocation decision. *N.J.S.A.* 30:4-123.60 (c), *See also Morrissey, supra,* 408 *U.S.* at 490.

In view of this, the assumption underlying the Third Circuit's policy analysis that a prisoner subject to a probation violation detainer can reasonably expect the charge to be resolved in his favor has no realistic basis. In practice, and as the Court has noted, an early adjudication of a parole or probation violation charge *increases* the probability that a decision to revoke will be made. *Moody v. Daggett, supra,* 429 *U.S.* at 89 ("forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions . . . a decision to revoke parole would often be foreordained."). Thus, such a prisoner would not be able to realize any measurable rehabilitative benefit if Article III of the IAD was applicable to probation or parole violation detainers precisely because an early adjudication of the pending charge would tend to assure that a revocation decision will be made. Hence, the prisoner will continue to be subject to a detainer while serving the intervening sentence.*

The Third Circuit recognized that when a prisoner commits a new crime while on probation a virtually conclusive presumption that probation will be revoked is trig-

*It might be suggested that a prisoner might benefit by an early revocation hearing even if his parole is revoked because the violation term might run concurrently to the new, out-of-state sentence. In New Jersey, however, parole violation terms are presumed to run consecutively to any sentence imposed for a crime committed while on probation. *N.J.S.A.* 2C:44-5(c) (amended eff. January 12, 1984). *See also N.J.S.A.* 30:4-123.27 (repealed eff. April 20, 1980). The Parole Board, moreover, has no power to order that the violation term run concurrently to a sentence imposed for a crime committed while on parole; such power is exclusively vested in a judge of the New Jersey Superior Court. *Id.* Moreover, in the very case before the Third Circuit, the New Jersey probation violation term was ordered to be served consecutively to Nash's Pennsylvania sentence (App. 6).

gered (App. 9 & n.7). The Court acknowledged that in such a case the interest of the prisoner in seeking an early adjudication of the pending probation violation charge would not be sufficiently compelling to outweigh the administrative burden and expense to the state in conducting the revocation hearing prior to completion of the out-of-state sentence. (App. 9 & n.7; *see also* App. 13 n.10: "requiring adjudication before the out-of-state sentence has been served increases the cost because it requires an additional trip.") However, the court felt that in a "significant number" of cases, the probation violation charge lodged against the prisoner incarcerated out of state would not be based on the new sentence at all, but would be based upon technical, noncriminal violations of the prisoner's probation agreement (App. 9 n.7). The court concluded, accordingly, that since the adjudication of a technical probation violation charge may require live testimony and that since a prisoner who is incarcerated out of state may be compromised by the delay in the adjudication of the charge, "concern for a fair adjudication, as well as concern for constitutional rights should inform our interpretation of the IAD" (App. 10 n.7).* Nothing in the record before the Third Circuit, however, provided any support for the view that a significant number of probation violation detainers lodged against prisoners serving new sentences are based solely on technical, noncriminal charges and the factual circumstances which would give rise to such a scenario do not readily come to mind, at least under New Jersey law.

*The Third Circuit had previously ruled, however, that a prisoner serving a sentence in another jurisdiction has no due process right to an immediate parole revocation hearing. *U.S. ex rel. Caruso v. U.S. Bd. of Parole,* 570 *F.*2d 1150 (3rd Cir. 1978).

The Third Circuit's opinion conflicts with the long-standing, uniform legal interpretation of an interstate agreement entered into by almost every sovereign entity in this country.* The court's ruling, moreover, leads to a paradoxical result that surely no legislature ever intended. Under the Third Circuit's analysis, the rights afforded by the IAD to a prisoner who is subject to a detainer based upon a new criminal charge incorporate precisely that which is mandated by the federal Constitution, namely, to have the new criminal charge disposed of expeditiously, notwithstanding incarceration out of state. *Klopfer v. North Carolina,* 386 *U.S.* 213 (1967) (speedy trial clause of the Sixth Amendment incorporated into the Fourteenth Amendment); *Smith v. Hooey,* 393 *U.S.* 374 (1969) (constitutional right to a speedy trial not obviated by defendant's incarceration out of state.)**

But under the Third Circuit analysis, the rights afforded by the IAD to a prisoner subject to a parole or probation violation detainer far *exceed* any constitutional right he has in this context. *Moody v. Daggett, supra,* 429 *U.S.* 78 (no federal due process right to have parole detainer executed promptly after filing whenever prisoner is serving intervening sentence imposed by the same sovereign); *U.S. ex rel. Caruso v. U.S. Board of Parole,* 570 *F.*2d 1150 (3rd Cir. 1978) (no federal due process right to have parole detainer executed promptly after its filing

*The first ruling on the question of the scope of Article III was in 1970. *People v. Batalias, supra.,* (IAD inapplicable to probation violation detainer).

**Note also that a prisoner subject to a new-charges detainer is presumed innocent of the underlying criminal charge. *Compare with Morrissey v. Brewer, supra,* 408 *U.S.* at 490. (Conviction of new crime while on parole or probation conclusively establishes factual guilt of violation).

whenever prisoner is serving intervening sentence imposed by a different sovereign). It is certainly anomalous to conclude that by virtue of the IAD a legislature intended to give a prisoner subject to a parole or probation violation detainer far greater rights than are afforded him by the federal Constitution and to give a prisoner subject to a new-charges detainer only those rights absolutely mandated by the Constitution. Further, it is anomalous to conclude that any legislature intended to authorize the expense of returning temporarily to the jurisdiction a prisoner subject to a parole or probation violation detainer for the purpose of conducting an early revocation hearing when the issue of factual guilt is conclusively resolved and the probability that the prisoner's parole or probation will be revoked is increased precisely because an early revocation hearing is being conducted.

The paramount obligation of a court called upon to construe legislation is to effectuate the intent of the legislature. *See, e.g., Dickerson v. New Banner Institute, Inc.,* — *U.S.* —, 103 *S.Ct.* 986, 994 (1983). In *Nash,* the Third Circuit has ignored this fundamental principle of statutory construction. Manifestly, it has imposed its own policy preference upon the operation and administration of the IAD. (*See, e.g.,* App. 13 n.9). Review by the Court is required to restore uniformity in the legal construction of the applicable scope of the IAD.

(b) The issue involved herein raises a significant federal question which should be resolved by the Court.

The Third Circuit's ruling in *Nash* creates enormous uncertainty about the legal obligation of the fifty sovereign entities that are signatory to the IAD. Must, for

example, the states of Arkansas, Georgia, South Carolina, Colorado, New York or Tennessee, whose courts have ruled that the IAD does not apply to probation violation detainers,* comply with the IAD whenever they lodge a probation violation detainer against a prisoner housed in New Jersey, or in any other state within the geographical region encompassed by the Third Circuit?

Must the federal government, or any state within the geographical region of the Ninth Circuit, or Oklahoma, Illinois, Florida or Michigan, wherein the state or federal court has ruled that the IAD does not apply to parole violation detainers,** comply with the IAD whenever they lodge a probation violation detainer against a prisoner housed in New Jersey, or in any other state within the geographical region encompassed by the Third Circuit?

What if any of the fifty sovereign entities that are signatory to the IAD lodge a parole violation detainer against a prisoner incarcerated in New Jersey, or in any of the other states within the geographical region encom-

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*Padilla v. Arkansas, 279 Ark. 100, 648 S.W.2d 797 (1983); Suggs v. Hopper, 234 Ga. 242, 215 S.E.2d 246 (1975); State v. Knowles, 275 S.C. 312, 270 S.E.2d 133 (1980); People v. Jackson, 626 P.2d 723 (Colo. App. 1981); People ex rel. Capalongo v. Howard, 87 App. Div.2d 242, 453 N.Y.S.2d 45 (N.Y. App. Div. 1982); People v. Batalias, 35 App. Div. 2d 740, 316 N.Y.S.2d 245 (N.Y. App. Div. 1970); Blackwell v. State, 546 S.W.2d 828 (Tenn. Crim. App. 1976).

**Hopper v. U.S. Parole Comm'n, 702 F.2d 842 (9th Cir. 1983); Sable v. Ohio, 439 F. Supp. 905 (W.D. Okla. 1977); Hernandez v. United States, 527 F. Supp. 83 (W.D. Okla. 1981); Irby v. Missouri, 427 So.2d 367 (Fla. App. 1983) overruling Gaddy v. Turner, 376 So.2d 1225 (Fla. App. 1979); Cart v. DeRobertis, 453 N.E.2d 153 (Ill. App. Ct. 1983); Maggard v. Wainwright, 411 N.E.2d 200 (Fla. App. 1982); Wainwright v. Evans, 403 So.2d 1123 (Fla. App. 1981); Buchanan v. Mich. Dept. of Corrections, 50 Mich. App. 1, 212 N.W.2d 745 (Mich. Ct. App. 1973).

passed by the Third Circuit. Is the ruling of *Nash* applicable? These are only a few of the questions raised as a result of *Nash*. They indicate that the issue of the applicable scope of the IAD presents a federal question of significance which must be addressed by the Court.

A prisoner subject to a probation violation detainer will not garner any meaningful rehabilitative benefit as a result of the Third Circuit's ruling in *Nash*, since the likelihood his probation will be revoked increases whenever an early revocation hearing is conducted. The prisoner, accordingly, will be subject to a detainer during the entire period of service of the intervening sentence. Certainly, if the primary purpose of the IAD was to enable a prisoner subject to a detainer to participate fully in rehabilitative programs, this purpose could have been achieved directly simply by enacting an interstate agreement which provided that prisoners subject to a detainer would not be foreclosed from participating in any rehabilitative programs. In practice, the only benefit to a prisoner as a result of the Third Circuit's ruling is that now he has a technical legal mechanism to avoid altogether completion of his duly imposed sentence. Richard Nash is the perfect example. Nash has successfully voided the obligation of service of a duly imposed New Jersey sentence by means of the IAD (App. 43). Because of the Third Circuit's ruling in Nash, which was not made prospective, all prisoners who are housed in the geographic region of the Third Circuit, and who are subject to a probation violation detainer, may be freed from the obligation of completion of service of their sentence if they have heretofore invoked Article III of the IAD. The possibility that hundreds of duly convicted prisoners may be released

prior to the completion of their sentence because of *Nash* warrants the Court's review as does, surely, the need to restore legal uniformity in the interpretation of the applicable scope of the IAD.

———o———

CONCLUSION

For all the foregoing reasons, this petitioner, the State of New Jersey, Department of Corrections, submits that a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Dated: November 20, 1984

(2)

No. 84-835

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner

v.

RICHARD NASH,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether Article III Of The Interstate Agreement On Detainers Applies To A Detainer For Violation Of A Probationary Sentence Entered After Conviction By Interpreting The Phrase "Untried Indictment, Information Or Complaint" To Encompass Such A Detainer?[1]

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[1]Petitioners raise an additional question regarding application of the Interstate Agreement on Detainers to the specific facts of this case. Amici take no position on that issue.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

84-835

THE STATE OF NEW JERSEY,
Department of Corrections,

Petitioner

Against

RICHARD NASH,

Respondent

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING

IN
SUPPORT OF PETITION FOR WRIT
OF CERTIORARI

ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTEREST OF AMICI

This petition raises an important question regarding interpretation of the Interstate Agreement on Detainers (Agreement).[2] Article III of the Agreement obligates a prosecutor to bring an out-of-state prisoner to trial within 180 days of the prisoner's delivery of a written notice of his request for final disposition of "any untried indictment, information or complaint." Failure to return the prisoner permits a court to dismiss the untried charge with prejudice and to order that the detainer based on the

[2]The Interstate Agreement on Detainers is a uniform compact approved by Congress and enacted into law by forty-eight states, the District of Columbia and the United States. As congressional consent transforms the Agreement into a law of the United States, its construction presents a federal question. Adams v. Cuyler, 449 U.S. 433, 438 (1981).

charge have no effect. The decision of the Court of Appeals for the Third Circuit unsettles an otherwise uniform interpretation of the Agreement by broadening the application of Article III to permit a sentenced prisoner to compel his return for a probation revocation hearing. The amici states, all signatories to the Agreement, submit that if the Third Circuit's opinion stands, a new and substantial administrative and fiscal burden will be placed on the signatory states' limited personnel and financial resources without providing the salutary effect perceived to exist by the Court of Appeals. The conflict caused by the opinion of the Third Circuit, in a previously uniform interpretation of the

Agreement[3] affects all party states since any might have a detainer lodged against a prisoner confined in the states of the Third Circuit.

The considerable confusion which this split of authority creates cannot be over-emphasized. Each detainer case involves two states, one of which may be within the Third Circuit and the other not. The uncertainty regarding the application of the Agreement to cases in which only one of the states is within the Third Circuit creates serious difficulties for all of the amici. If,

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[3] While one district of an intermediate state court of appeals had ruled that the Agreement is applicable to a probation violation detainer, Gaddy v. Turner, 376 So.2d 1225 (Fla. App. 1979) and Lorenzo v. State, 422 So.2d 1058 (Fla. App. 1982), it subsequently abandoned this holding in Irby v. State of Missouri, 427 So. 2d 367 (Fla. App. 1983), upon review of the otherwise uniform interpretation finding the Agreement inapplicable to such a detainer.

as we argue along with petitioners, the Third Circuit's decision is erroneous, enormous cost will be incurred without reason. Amici, accordingly, have a substantial interest in the outcome of this case.

Summary of Argument

The Court of Appeals for the Third Circuit has decided a question of federal law as to the proper interpretation of Article III of the Agreement in a way which conflicts with the only other court of appeals which has addressed the issue and with all four state courts of last resort which have addressed the issue.

The Court of Appeals' decision ignores the plain language of the statute and renders a phrase limiting its scope surplusage. The assumptions used by the Court of Appeals as the foundation from which to extrapolate its policy interpretation of the relevant language are faulty. The policy the court attempts to advance by its expanded application of the Agreement to

permit prisoners to resolve detainers for probation violation, a policy it asserts is consonant with the "proper allocation of society's resources" requires legislative action - it is not a proper judicial resolution.

Reasons for Granting the Writ

1. The Court of Appeals for the Third Circuit has rendered a decision on a federal question which is in conflict with the decisions of another court of appeals and four state courts of last resort.

Recently, the Court of Appeals for the Ninth Circuit expressly rejected the Third Circuit's construction of Article III of the Agreement in a situation virtually identical to this case. United States v. Roach, 745 Fed 1252 (9th Cir. 1984). The Roach decision follows the Ninth Circuit's decision in Hopper v. United States Parole Commission, 702 F.2d 842 (9th Cir. 1983), in which Article III of the Agreement was held to be inapplicable to a detainer for parole violation. Similarly, each state court of last resort which has interpreted the question of the Agreement's applicability to a detainer for probation vio-

lation has found it inapplicable. See Clipper v. Maryland, 295 Md. 303, 455 A.2d 973 (1983); Padilla v. Arkansas, 279 Ark. 100, 648 S.W. 2d 797 (1983); State v. Knowles, 275 S.C. 312, 270 S.E.2d 133 (1980); Suggs v. Hopper, 234 Ga. 242, 215 S.E.2d 246 (1975).[4] The conflict created by the Third Circuit's decision of this uniform statute potentially affects all other party states.

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[4]Intermediate courts in three states also have found the Agreement inapplicable to probation violation detainers, People v. Jackson, 626 P.2d 723 (Colo. App. 1981); People ex rel. Capalongio v. Howard, 87 App. Div. 2d 242, 453 N.Y.S. 2d 45 (N.Y. App. Div. 1982); and Blackwell v. State, 546 S.W. 2d 828 (Tenn. Crim. App. 1976), while intermediate courts in three other states have found the Agreement inapplicable to parole violation detainers. Irby, supra; Cart v. DeRobertis, 453 N.E. 2d 153 (Ill. App. Ct. 1983); and Buchanan v. Michigan Department of Corrections, 50 Mich. App. 1, 212 N.W. 2d 745 (Mich. Ct. App. 1973).

Obviously, an agreement between so many states, the federal government and the District of Columbia should receive a consistent interpretation wherever it is in effect. The essential purpose of uniform laws, to bring consistency and predictability to state laws in matters of potential interstate concern, requires uniform interpretation. The need for consistency in interpretation is underscored where, as here, the statutes govern relationships among officials of different states. In its petition for certiorari, the State of New Jersey, Department of Corrections, aptly describes the massive confusion resulting from the situation in which parties to a single agreement have varying obligations and responsibilities depending upon the interpretation prevailing in their jurisdiction. Pet., p. 13-16. Rather than assisting

prisoners in their rehabilitation efforts with little measurable cost to the states as the Third Circuit opines, the decision here creates traps for the unwary administrator whose missteps will foreclose many meritorious probation and parole revocation proceedings.

The conflict in interpretation of the Agreement and the confusion that this divergence of opinions creates merit this Court's review.

2. The Third Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

In this case, the Third Circuit went beyond the traditional (or as they termed it, technical) definition of "untried indictment, information and complaint," and decided that a detainer for violation of a probationary sentence entered after a guilty plea was an "untried complaint" within the meaning of Article III of the Agreement. Pet. App. 7-14. The Court of Appeals reached this conclusion by endorsing the district court's liberal interpretation of the "broad purposes" of the Agreement and observing that, in its opinion, "[f]airness to the prisoners and proper allocation of society's resources require that detainers be promptly removed unless the prisoner has been

finally and constitutionally sentenced...." Pet. App. 12. Neither the legislative history examined by the Third Circuit nor the plain meaning of the statute itself supports the Third Circuit's decision.

The available legislative history examined by the Court of Appeals does not reveal a clearly expressed legislative intent contrary to the plain meaning of the language of the statute.[5] To the contrary, amici submit that the language of the history supports their interpretation. As observed by the petitioner, the quoted commentary merely suggests in general terms the various possible sources of detainers. Petition, p. 8. If, indeed,

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[5]The legislative history upon which the Court of Appeals relied consisted of statements of the Council of State Governments which drafted the Agreement in 1956. Pet. App. 10.

this is meant to control the meaning of the word detainers in Article III of the Agreement, the inevitable conclusion is that the phrase "any untried indictment, information or complaint" is surplusage. Such an interpretation rendering a portion of a statute plainly redundant should be avoided. Bell v. New Jersey, 51 U.S.L.W. 4647, 4651 (U.S. May 31, 1983).

The available legislative history from the Congress, developed when the United States adopted the Agreement, reveals that the House and Senate Committees on the Judiciary found "the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." H. Rep. No. 91-1018, S. Rep.

Petition, p. 8. If, indeed, this is meant to control the meaning of the word detainers in Article III of the Agreement, the inevitable conclusion is that the phrase "any untried indictment, information or complaint" is surplusage. Such an interpretation rendering a portion of a statute plainly redundant should be avoided. Bell v. New Jersey, 51 U.S.L.W. 4647, 4651 (U.S. May 31, 1983).

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No. 91-1356, reprinted in 1970 United States Code Congressional and Administrative News 4864.[6] Nowhere in the Congressional history are detainers for violation of probationary sentences or the conditions of parole mentioned. As there is no constitutional "speedy trial" right to disposition of such detainers, Moody v. Daggett, 429 U.S. 78 (1976), it necessarily follows that disposition of such detainers was not within the scope of expressed Congressional concern.[7]

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[6]This legislative history was not examined by the Court of Appeals in its effort to divine the meaning of the phrase under scrutiny.

[7]Only one state, Kentucky, has seen fit to specifically amend the Agreement to include detainers for violations of probation and parole. Kentucky Revised Statutes, Section 440.453, Enact. Acts 1976, Ch. 211, §1. The effect of that amendment, enacted before Moody, has never been triggered since it requires another party state to enact such an amendment.

In an effort to find a policy basis to support its interpretation of the Agreement's scope, the Court of Appeals assumed that a quick hearing on the revocation necessarily benefits the prisoner. This assumption is misplaced. As explained in Moody, in the context of a parole revocation hearing:

> Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information [found in the parolee's institutional record], but since the most salient factor would be the parolee's recent convictions, a decision to revoke parole would often be foreordained. Given the predictive nature of the hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate--at the expiration of the parolee's intervening sentence.

429 U.S., at 89.

While a prisoner's not knowing the ultimate decision whether a sentence of probation will be revoked may appear

harsh and counter-rehabilitative, compelling an almost certain revocation of probation or parole and the probable imposition of the longest sentence permitted is neither fair nor a proper allocation of society's resources.

Two additional factors further undercut the Court of Appeals' analysis. First, it can be assumed safely that a parolee or probationer who has committed an offense which results in incarceration almost certainly will have his parole or probation revoked. The new conviction is itself conclusive on the question whether the underlying conduct occurred and only in the most unusual cases will this fail to persuade parole or probation authorities to take action. Secondly, even if parole or probation revocation is, by virtue of application of the Agreement, accomplished at an early date, the sentence

imposed frequently will be for a permissible range of time, rather than a specific, determinate time period. These factors weaken substantially the underlying basis for the Court of Appeals' conclusion--namely, that early disposition of detainers provides certainty as to the time of release and frees the prisoner for rehabilitation programs. The result of early disposition of parole or probation violation detainers almost certainly will be additional prison sentences for uncertain periods of time, all of which will likely lessen the prisoners' chances for participation in rehabilitation programs without providing certainty as to the date of eventual release.

The Court of Appeals was without the power to "expand[] the scope of

Article III..."[8] beyond the plain meaning of the Agreement's language as supported by the available legislative history. To expand the scope of the Agreement is a legislative function not a judicial one. Moreover, the so-called policy considerations employed by the Court of Appeals do not withstand analysis. For these additional reasons, the decision of the Court of Appeals should be reviewed.

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[8] Id., Pet. App. 13, n. 9.

Conclusion

The petition for a writ of certiorari should be granted and upon review the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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No. 84-776 (1)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PHILIP S. CARCHMAN, ESQ.
MERCER COUNTY PROSECUTOR,

Petitioner,

v.

RICHARD NASH,

Respondent.

No. 84-835 (9)

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS

Petitioner,

v.

RICHARD NASH,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT SUBMITTED BY THE MERCER COUNTY PROSECUTOR AND STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS

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No. 84-776

IN THE
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PHILIP S. CARCHMAN, ESQ.
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RICHARD NASH,

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No. 84-835

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS

Petitioner,

v.

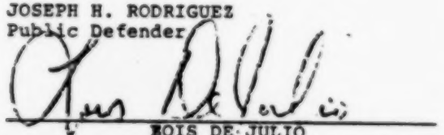
RICHARD NASH,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS
AND TO PROCEED ON TYPEWRITTEN PAPERS

The Respondent, Richard Nash, asks leave to file the attached Brief in Opposition to the Petitions for Writ of Certiorari from the decision of the United States Court of Appeals for the Third Circuit, without prepayment of costs, to proceed in forma pauperis pursuant to Rule 46, and to proceed on typewritten papers pursuant to Rule 47.3. Respondent has previously been found to qualify for the services of the Office of the Public Defender at every stage of the proceedings in the courts of the State of New Jersey. Respondent's affidavit in support of this motion is attached hereto.

JOSEPH H. RODRIGUEZ
Public Defender



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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-776

PHILIP S. CARCHMAN,

Mercer County Prosecutor,

Petitioner,

v.

RICHARD NASH,

Respondent.

No. 84-835

STATE OF NEW JERSEY,
Department of Corrections,

Petitioner,

v.

RICHARD NASH,

Respondent.

I, RICHARD NASH, being duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therfore, I state that because of my poverty I am unable to pay the costs of said case or to give security therfore; and that I believe I am entitled to the redress in this case.

I am presently employed by Colortyme T.V. Rentals, 2881 Mt. Ephrain Avenue, Camden, New Jersey at a weekly salary of $165.00. Within the past twelve months, I have not received any other income, interest, dividend or payment. The balances both of my checking and savings account contain less than the amount of $10.00. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property. My fiance, Ms. Jacqueline Kerlin, is dependent upon me for support.

During all of the proceedings below, I qualified for representation by the Public Defender of New Jersey. I represent that I am still qualified for representation by that office pursuant to its eligibility standards.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

RICHARD NASH

Subscribed and Sworn to before
me this 20 day of December 1984.

J. Stewart Hurd
Attorney at Law
State of New Jersey

QUESTIONS PRESENTED FOR REVIEW

1. Since the decision of the Third Circuit Court of Appeals is distinguishable from the decision of the Court of Appeals for the Ninth Circuit in Hopper v. United States Parole Commission, 702 F.2d 842 (1983), should this Court grant the writ of certiorari in the absence of a direct conflict between Federal Courts of Appeal?

2. Is it not premature to decide that there exists a question of national importance where there is no direct conflict with seven of the jurisdictions cited by the Petitioner and no indication that the decision of the Third Circuit disrupts the administration of the law?

3. Since the State treated Respondent's letters as a request for a final disposition and hearing under Article III of the IAD, was he not excused from strict compliance with the formal notice requirements of the Act?

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STATEMENT OF THE CASE

While serving a New Jersey sentence of probation, Richard Nash was arrested in Montgomery County Pennsylvania on June 13, 1978. Subsequently, on June 21, 1978, the Mercer County Probation Department of the State of New Jersey filed a detainer against Nash charging him with a violation of probation. On March 14, 1979, Nash was convicted of all Pennsylvania charges and, on July 13, 1979, sentenced to a minimum of 5 years and a maximum of 10 years to be served at the State Correctional Institution at Dallas, Pennsylvania.

On April 13, 1979, Nash wrote a letter to the Mercer County Prosecutor's Office requesting advice as to what he should do to dispose of the detainer filed against him. Although the letter did not specifically refer to the Interstate Agreement on Detainers, the request was clear. In a reply letter dated May 16, 1979, the Prosecutor's office claimed not to have jurisdiction over the matter and advised Mr. Nash to contact his New Jersey Probation Officer.

On May 17, 1979, relying upon this advice, Mr. Nash wrote a letter to the Mercer County Probation Office. On May 23, 1979 Probation Officer Robert A. Hughes responded. Mr. Nash was informed that his request for disposition of the charge had been conveyed to Judge A. Jerome Moore, J.S.C., and that Judge Moore had stated that no action would be taken by the State on the detainer until Mr. Nash had been sentenced. The letter advised Nash to contact the Probation Office after he was sentenced.

On July 20, 1979, seven days after he was sentenced, Nash wrote the Mercer County Probation Office and renewed his request for a final disposition of the charge. On August 3,

1979, Probation Officer Judith Giordano replied that a probation revocation hearing would be held in the court of the Honorable Richard J. S. Barlow, Jr. as soon as Mr. Nash was appointed a Public Defender.

No hearing having been scheduled, on November 5, 1979, Nash wrote to the Chief Probation Officer of Mercer County explicitly requesting final disposition of the probation violation charge on the basis of the Interstate Agreement on Detainers Act and stating that the Pennsylvania Bureau of Corrections had been asked to attach a certificate. A copy of this letter was sent to Judge George Y. Schoch, the Assignment Judge of the Superior Court of New Jersey, Mercer County. Judge Schoch referred Nash's letter to the Mercer County Prosecutor's Office with an attached note "suggesting" Mr. Nash was invoking the terms of the Interstate Agreement on Detainers.

On December 6, 1979, Nash executed Form II under the Interstate Agreement on Detainers formally requesting transfer to Mercer County to resolve the probation violation charge. This form was delivered to the Mercer County Prosecutor along with Form IV used under the Interstate Agreement on Detainers as an offer to deliver temporary custody of the prisoner to the Prosecutor.

On December 14, 1979, the Mercer County Prosecutor's Office delivered Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas. The form authorized two agents of the Mercer County Prosecutor's Office to take custody of the prisoner on December 20, 1979. The Mercer County Officers arrived at Dallas on the appointed date, but were informed that Nash had

been temporarily transferred to the prison facility at Graterford on December 11, 1979. No attempt was made to take custody of Nash during his confinement at Graterford.

On February 28, 1980, after Nash had been returned to Dallas, Mercer County executed a new Form VI. The form designated March 10, 1980 as the date when Nash would be taken into custody. Nash refused to sign additional papers to effectuate his transfer to New Jersey.

On March 6, 1980, Nash filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking dismissal of the detainer. An amended petition was filed on December 9, 1980. On February 3, 1981, the District Court for the Middle District of Pennsylvania transferred the case to the United States District Court of the District of New Jersey. On June 23, 1981, the Honorable Dickinson R. Debevoise, U.S.D.N.J., ordered that Nash's federal action be stayed until he had exhausted State remedies.

On August 24 and 25, 1981, the Honorable Richard Barlow, Jr., J.S.C. held a hearing in which he denied Nash's motion to dismiss the detainer. Judge Barlow found that Nash's Pennsylvania convictions constituted a violation of probation and re-sentenced him to two consecutive terms of eighteen months each to be served in the Mercer County Detention Center. Nash appealed to the Appellate Division of the Superior Court of New Jersey on the ground that the State had failed to provide a hearing within the statutorily prescribed time period. The Appellate Division affirmed the judgment of conviction on June 22, 1981; a petition for certification was denied by the New Jersey Supreme Court on November 12, 1981.

On January 4, 1983, Judge Debevoise held a hearing on the matter at the United States Court at Philadelphia. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. Section 2241 and 28 U.S.C. Section 2254. On March 7, 1983, the court issued an opinion dismissing the detainer lodged against Nash and nullifying his conviction of violation of probation. Nash v. Carchman, 558 F. Supp 641 (D.N.J. 1983). The court ruled that article III of the IAD is applicable to detainers based upon probation violation complaints, and that the State had violated Nash's rights.

The Mercer County Prosecutor appealed the decision of the District Court. During the pendency of the appeal, the State of New Jersey, Department of Corrections, moved to intervene on the ground that the opinion of the District Court invalidated one of its office policies. On June 29, 1983, the Court of Appeals granted the movant's request.

On July 10, 1984, the Third Circuit Court of Appeals affirmed the district court's ruling. The Third Circuit had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. Section 1291. A petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 27, 1984. The mandate was filed on September 4, 1984.

On November 5, 1984, Phillip S. Carchman, Mercer County Prosecutor, filed a petition for a writ of certiorari from the decision of the United States Court of Appeals for the Third Circuit. On November 20, 1984, the State of New Jersey, Department of Corrections, filed a separate petition.

REASONS FOR NOT GRANTING THE WRIT

POINT ONE

THE DECISION OF THE COURT OF APPEALS HAS NOT CREATED A CONFLICT IN THE INTERPRETATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

The decision of the Court of Appeals is not in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in Hopper v. United States Parole Commission, 702 F. 2d 842 (1983). Although the opinion is at odds with a small group of lower court cases, no question of national importance has yet arisen, nor has the administration of the law been disrupted. The request for review by this Court is premature and, in view of the eminently reasoned decision of the court below, unnecessary.

The Court of Appeals for the Third Circuit held that a detainer based upon a probation violation complaint is within the scope of the Interstate Agreement on Detainers. Nash v. Jeffes, 739 F.2d 878, 884 (3rd Cir. 1984).[1] In Hopper, the Court of Appeals for the Ninth Circuit held that a detainer based upon an "unadjudicated parole violation warrant" is not within the Act. Id. at 846. The two cases are not diametrically opposed as they are based upon distinctions between probation and parole.

Probation and parole are not interchangeable terms within the context of the IAD. Probation is exclusively a

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1. In the petition of the Mercer County Prosecutor, the holding of the Court of Appeals is persistently misrepresented as applying to parole as well as to probation violation detainers.

judicial matter within the jurisdiction of the court, while parole is an administrative matter within the jurisdiction of an administrative body, the State Parole Board. See, N.J.S.A. 2C:45-1 et seq; N.J.S.A. 30:4-123 et seq. A detainer based upon a charge of probation violation is filed by the prosecutor in whose county the sentence of probation was imposed. A detainer based upon a charge of parole is filed by the State Parole Board. N.J.A.C. 10A:71-7.2(b). A revocation of probation is heard before the court which imposed the sentence of probation, while the revocation of parole is heard before the State Parole Board or a parole officer. See, N.J.S.A. 2C:45-4; N.J.S.A. 30:4-123.60 and N.J.A.C. 10A:71-7.12. Dispositional alternatives available to a court in the event of revocation are not available to the State Parole Board. Compare, N.J.S.A. 2C:45-3(b) with N.J.A.C. 10A:71-7.16.

These practical distinctions render the act eminently more suitable to a detainer based upon a probation violation complaint. Specifically, the notice requirements of Article III serve to inform the correct authorities of the prisoner's request for a hearing, and resolution of the charge accomplishes the overall aims to be achieved by the Act. The same effect is not obtained with an application of the IAD to a parole violation detainer.

Article III requires a prisoner to deliver his demand for a final disposition of the charge underlying the detainer to "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction." N.J.S.A. 2A:159A-3(a).

Although this notice requirement informs those with jurisdiction over a probation violation complaint of the request for final disposition, it does not do so for a parole violation complaint. The Court of Appeals noted:

> In the probation violation context, the notice of the prosecutor and the judge required by Article III places the appropriate officials on notice of the prisoner's request for adjudication under the IAD. We note that if this were a parole violation rather than a probation violation, the notice required by the IAD might not be appropriate to inform the state officials with jurisdiction over the outstanding charge.

Nash v. Jeffes, 739 F.2d 878, 883, n.11 (3rd Cir. 1984) Because the operative provisions of the IAD can be so readily applied to dispose of detainers based on probation violations, the Court concluded that the legislature must have intended the act to apply.

The IAD is designed to alleviate the adverse consequences engendered by detainers which block a prisoner's access to rehabilitative programs. L. Abramson, Criminal Detainers, at p. 93 (1979); Note, Convictions - The Right To A Speedy Trial And The New Detainer Statutes, 18 Rutgers L. Rev.828, 832 (1974). Restrictions are placed upon inmates against whom a detainer is lodged under the assumption that they pose a greater escape risk than other inmates since they face the possibility of serving a future sentence of unknown duration. Note, Detainers And The Correctional Process, 4 Wash. U.L.Q. 417, 419 (1966).[2] The uncertainty surrounding

2. These restrictions are placed upon inmates without regard to the nature of the charge underlying the detainer. 4 Wash. U.L.Q. 417,419, supra.

the future of a prisoner against whom a detainer is lodged prevents prison officials from designing an effective program of rehabilitative treatment. Id. at 421 and 422. Resolution of the charge removes the restrictions placed upon the inmate, since the terms of the prisoner's future are made certain. Because a greater degree of uncertainty is cast over the future of a prisoner by an unresolved probation violation complaint, the aim of the legislation is more effectively accomplished when the act is applied to that kind of detainer.

At a revocation hearing, a court must first determine whether the terms of probation were violated. Although conviction of another crime raises a presumption of violation, the court is not required to revoke probation. N.J.S.A. 2C:45-3(4). As one commentator has noted:

> there is a possibility of prejudice where the new conviction is for a minor offense that may not warrant revocation, and delay complicates resolution of the revocation issue. L. Abramson, Criminal Detainers, at 86 (1979).

In the event a court decides to revoke probation, it is empowered to impose any sentence it could have imposed upon the original conviction, or to continue probation. Application of White, 18 N.J. 449, 114 A.2d 261 (1955). Any sentence imposed may be ordered to run either concurrently or consecutively to the out-of-state sentence the prisoner is then serving. Out of the total range of dispositions that may be imposed, many may serve to clarify the future of the prisoner and obviate the restrictions placed upon him by the detainer. When the complaint is based upon a charge of technical, non-compliance with the terms of probation, the early revocation hearing enables the prisoner to

attack the charge with fresh evidence. Nash v. Jeffes, 739 F.2d. 878, (3rd Cir. 1984).[3] Thus, petitioner's "fundamental assumption" that there is no interest in speedy resolution of probation violation detainers is erroneous.[4]

Not as much is at stake for the prisoner at the parole revocation hearing. A lesser array of dispositional alternatives restricts the discretion of the Parole Board N.J.A.C. 10A:71-7.16. The Board can only determine whether to run the balance of the sentence, for which parole is revoked, either concurrently or consecutively to the intervening out-of-state sentence. In as much as the decision of the Parole Board is less likely to produce a result that would lift the restrictions imposed upon the inmate by the detainer, the aims of the IAD are not as well accomplished.

In Hopper, the Court of Appeals for the Ninth Circuit ruled that the IAD is not applicable to parole violation complaints. The decision rested upon implicitly recognized distinctions between parole and probation violation complaints. Since entirely different implications are raised by each in the context of the IAD, the decision of the Ninth

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3. Detainers of this sort are not uncommonly placed. See, e.g. Padilla v. State of Arkansas, infra. The petitioner's reliance upon Padilla ironically disproves its thesis that a detainer based upon a technical violation is likely to be rare.

4. Since there is no mechanism by which to apply the sentence on the probation violation retroactively, if the IAD is held not to apply, a judge would never be able to impose concurrent sentences and the prisoner would be denied the ensuing benefit.

Circuit is not in direct conflict with the decision of the Third Circuit Court of Appeals.

Three State Supreme Courts, Padilla v. Arkansas, 279 Ark 100, 648 S.W. 2d 797 (Sup. Ct. 1983); State v. Knowles, 275 S.C. 312, 270 S.E. 2d 133 (S.C. Sup. Ct. 1980); Suggs v. Hopper, 234 Ga. 242, 215 S.E. 2d 246 (Ga. Sup. Ct. 1975); and five State Appellate Courts, Irby v. State of Missouri, 427 So. 2d 367 (Fla. App. 1983), People ex rel. Capalongo v. Howard, 87 App. Div. 242, 453 N.Y.S. 2d. 45 (N.Y. App. Div. 1982); People v. Jackson, 626 P. 2d 723 (Colo. App. Ct. 1981); Blackwell v. State, 546 S.W. 2d 828 (Tenn. Crim. App. 1976); People v. Batalias, 35 App. Div. 740, 316 N.Y.S. 2d 245 (N.Y. App. Div. 1970), have found that a probation violation complaint is not included within the scope of the IAD.[5] None of these courts examined the legislative history of the IAD or supported their conclusions with persuasive analysis. One State Appellate Court and the Federal District Court below, however, have found that such a complaint is within the scope of the Act. Nash v. Carchman, 558 F.Supp. 641 (D.N.J. 1983); Gaddy v. Turner, 376 So.2d. 1225 (Fla. App. 1979), rev'd, Irby v. State of Missouri,

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5. The petitioner falsely augments the magnitude of the conflict by reference to cases dealing with parole matters. See , Hernandez v. United States, 527 F. Supp 83 (W.D. Okla. 1981), Sable v. Ohio, 439 F. Supp. 905 (W.D. Okla. 1977), Cart v. DeRobertis, 117 Ill. App. 3d 587, 72 Ill. Dec. 848, 453 N.E. 2d 153 (Ill. App. 1983); Maggard v. Wainwright, 411 So. 2d 200 (Fla. App. 1982); Wainwright v. Evans, 403 So. 2d 1123 (Fla. App. 1981); Buchanan v. Michigan Department of Corrections, 50 Mic. App. 1, 212 N.W. 2d 745 (Mich. Ct. App. 1973). The petitioner's argument falsely presumes that the Third Circuit decision applies to parole violation detainers, as well as to probation violation complaints, which it clearly does not. The split of decision that does exist between the Third Circuit and eight state courts is not sufficiently serious to warrant intervention by this Court.

supra. The Court of Appeals rested its decision upon the cogent analysis of the District Court remarking that:

> Although the authority on the other side is entitled to considerable weight, the strength of the district court's analysis far exceeds that of the opinions reaching the opposite result.
> Nash v. Jeffes, 739 F.2d 878, 881 (1984).

The Court of Appeals carefully analyzed the legislative history of the act and also weighed the administrative burdens and costs its decision would impose upon the State. The Court found that the State's interests in minimizing costs did not outweigh the prisoner's interest in rehabilitation. Nash v. Jeffes, supra at 883.

At this time, it is premature to decide whether the decision of the Third Circuit will be disruptive of the administration of the Interstate Agreement on Detainers. The decision has accorded rights to prisoners under the IAD that were previously unrecognized. Technically, the decision is binding only upon authorities within the domain of the Third Circuit which have lodged detainers against out-of-state prisoners. This is not to suggest, however, that the opinion will not have influence elsewhere. Rather, it can be presumed that jurisdictions not presently in accord with the opinion of the Third Circuit will follow the decision, given its great precedential weight. Cuyler v. Adams, 449 U.S. 433 101 S. Ct. 703 (1981). Additionally, as this Court has noted in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, n.5 at 782, 1760 (1973), some amount of disruption inevitably attends any new ruling. In any event, the disruption would be minor because the decision is limited to probation violation complaints which can be readily handled

under the existing operative mechanisms of the act. Until other courts of equivalent jurisdiction rule otherwise, or until courts of lower jurisdiction indicate a refusal to follow the ruling of the Third Circuit, the claim that the decision of the Court of Appeals has disrupted the uniform administration of the law is premature.

POINT TWO

THE COURT OF APPEALS CORRECTLY INTERPRETED THE LEGISLATIVE HISTORY OF THE INTERSTATE AGREEMENT ON DETAINERS.

Relying upon the legislative history of the IAD, the Court of Appeals correctly interpreted the phrase "untried indictment, information or complaint" as used in Article III to include detainers based upon probation violation complaints.

In 1948, the Joint Committee on Detainers issued a report dealing with problems attending the use of detainers and recommended a set of guiding principles. See, Council of State Governments, Suggested State Legislation for 1956. United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834 (1978). Under the auspices of the Council of State Governments, the committee drafted several proposals concerning detainers. In 1957, the final draft was published as part of the Council's Suggested State Legislation Program. See Council of State Governments, Suggested State Legislation for 1957. Currently, the Interstate Agreement on Detainers has been adopted by forty-eight states, the District of Columbia and the Federal Government. Note, Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers, 83 Colum L.Rev 975, 975 n.1 (1983).

The Act was principally designed to alleviate the adverse effects of detainers upon prisoner's prospects of rehabilitation. Note, Convictions The Right to a Speedy Trial and the New Detainer Statutes, 18 Rutgers L. Rev. 828, 832 (1964). In 1956, the Council of State Governments

succinctly expressed the nature of this problem:

> "The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated."

Council of State Governments, Suggested State Legislation for 1956, p. 60.

That Article III of the IAD was meant to comprehend and apply to all detainers, irrespective of the charges that underlie them, is obvious from the comments made by the Joint Committee in its "statement of aims" which included the following:

> I. Every effort should be made to accomplish the disposition of detainers as promptly as possible. This is desirable whether the detainer has been filed against an individual who has not yet been imprisoned or against an inmate of a penal institution. Prompt disposition of detainers is a proper goal whether the detainer has been filed by a local prosecutor, a state prison, a parole board, or a federal official. Detainers lodged on suspicion should not be p rmitted to linger without action. (Emphasis added.)
>
> III. Prison and parole authorities should take prompt action to settle detainers which have been filed by them. Prison officials and parole boards recognize that detainers create serious problems with respect to prisoners under their jurisdiction. Therefore, when such authorities file detainers against prisoners in other jurisdictions, they should cooperate fully to effect a prompt settlement of all detainers. They should promptly give notice as to whether they insist that the prisoner be returned at the end of his present sentence, or whether they will agree to a concurrent parole. Every effort should be made to cooperate in planning effective rehabilitation programs for the prisoner.

See, Council of State Governments, Suggested State Legislation for 1956, at 61. No distinction was made between detainers based upon probation violation complaints and those based upon other charges precisely because the drafters recognized the effects of both were equally pernicious.

In 1970, the Federal Government adopted the IAD. The federal legislative history echoes the same concern for prisoner's rights as the original legislative history of the Council of State Governments. In describing the need for the legislation, the Senate stated:

> The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound pre-release program.

Senate Rep. No. 91-1356, 91st Cong., 2nd. Sess. (1970), U.S.

Code Cong. & Ad. News 4864, 4866. In addition to affording prisoners redress to a specific complaint, Congress also intended to revamp the rehabilitation policies of the Federal Penal System.

During passage of H.R. Bill 6951 in the House of Representatives, Representative Richard H. Poff from the State of Virginia remarked:

> ...If a defendant is uncertain as to whether he will have to serve another jail term, he is less likely to have the motivation to become successfully rehabilitated. This latter consideration is especially important in view of the fact that the basic purpose of the entire penal system is to prepare its inmates to reenter society as law abiding citizens. (emphasis added)
> Congressional Record: H.R. 6951, 91st Cong., 2nd Sess., 116 Cong. Record, 13997, 14000 (1970)

Representative Poff concluded "...in view of these considerations, I feel that the Interstate Agreement on Detainers benefits both defendant and prosecutor, as well as society generally." Id. at 14000.

Drawing upon the clear message of the legislative history, the Court of Appeals concluded that "the drafters of Article III were concerned with the need to settle outstanding charges against prisoners in order to enable the prisoners to participate in rehabilitation programs." Nash v. Jeffes, 739 F.2d 878, 882 (3d Cir. 1984). Support for this conclusion not only rests upon the legislative history, but also upon the legislative mandate to "interpret the terms of the act broadly," N.J.S.A. 2A:159A-9, the directive that the act shall apply to "all outstanding charges" against the prisoner, N.J.S.A. 2A:159A-1, and the broad policy objectives to be accomplished. For these

reasons, the Court stated, "We decline to adopt a technical interpretation of the relevant language of Article III." Nash v. Jeffes, supra, at 883.[6] Indeed, the legislative history instructs that the phrase was intended not to limit the scope of the Act but to make certain the detainer is supported by a minimally valid charge. Washington Note, 4 Wash. U.L.Q. 417, 417-418.

"Technical" interpretations of the terms of the IAD that result in a circumvention of the Act's purposes have been uniformly rejected. United States v. Mauro, 436 U.S. 340, 98 S. Ct. 1834 (1978); Tinghitella v. State of California, 718 F.2d 308 (9th Cir. 1983). In Mauro, this Court ruled a writ of habeas corpus ad prosequendum is equivalent to a "written request for custody of the prisoner" under the terms of the Act, in spite of the technical nuances of the Federal Court instrument. Id. at 361, 1848. The Court rejected the technical interpretation offered because it would skirt the aims of the Act. In Tinghitella, the Court of Appeals for the Ninth Circuit held that the term "trial"

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6. The petitioner claims that the court misread the legislative history by misplaced emphasis upon the following commentary:

> Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state. (Council of State Governments Suggested State Legislation for 1957 at 74 (1956)). (Mercer County Prosecutor's Petition at 13-14; State of New Jersey Petition at 7.)

The petitioner's claim is not well-founded. First, the Court did not rely exclusively upon this commentary but upon the complete text of the historic material. Secondly, the definition given by the Council is not merely descriptive, as the petitioner suggests, but indicative of the scope the Act was intended to have.

encompassed sentencing as well as trial. In that case, the petitioner, after having been convicted of assault, absconded the State of California before he was sentenced. While imprisoned in Texas, he filed a request under the IAD to be returned to California for sentencing. California argued that Article III of the IAD was inapplicable because the detainer was not based upon an "untried indictment." The Court observed:

> The cases do not address the fact that the term "trial" in the speedy trial clause of the Sixth Amendment to the United States Constitution has been construed to include sentencing. Nor do they gainsay that the central policy foundations of the IAD support a broad construction of the term "trial", or that the IAD itself provides that it "shall be liberally construed to as to effectuate its purposes. (Cases and footnotes omitted). Id. at 311.

In the present case, the Court of Appeals rejected the technical interpretation offered by the State because it would have circumvented the aim of the Act to alleviate the adverse consequences of detainers.

The Act need not be amended to give it its intended meaning. One state, Kentucky, has amended its statute to apply to detainers based upon violations of probation and parole. Kentucky Revised Statutes Sec. 440.445. The Amendment provides in pertinent part:

> All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole. KRS 440.455(2).

The Amendment, however, does not indicate a short-coming in the original statement of the law, but rather reflects a

declaration of original intent. As one court has observed:

> "[The Kentucky Amendment] is simply declaratory of the intent and effect of the language of the uniform law ... which encompasses detainers based on complaints generally as well as indictment or information." Maggard v. Wainwright, 411 So. 2d 200, 203 (Fla. App. 1982), (dissenting opinion of Justice J. Wentworth).

Because the language of the statute is sufficiently definitive of the scope of the Act, legislative amendment is not needed.

POINT III

THE STATE OF NEW JERSEY FAILED TO COMPLY WITH THE PROVISIONS OF ARTICLE III OF THE INTERSTATE ARGEEMENT ON DETAINERS

Article III provides that a prisoner must be brought to trial within 180 days:

> ...after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction, written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

N.J.S.A. 2A:159A-3(a).

The notice provisions require that the prisoner file a written notice and request for final disposition of the detainer with the Prosecutor and Court. The written request must be accompanied by a certificate of the official having custody of the prisoner. N.J.S.A. 2A:159A-3(a). The certificate shall state "the term of the commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, time of parole eligibility of the prisoner, and any decisions of the State Parole agency." N.J.S.A. 2A:159A-3(a).

In this case, Respondent Nash did not strictly comply with the notice requirements of the statute. Although his written notice and request for final disposition were delivered to the prosecutor and appropriate court, they were not accompanied by a certificate from the official having custody of him at Dallas Prison in Pennslyvania.

The Court of Appeals excused his failure to strictly comply with the notice requirements because the failure was

directly attributable to "misleading information" given him by the State of New Jersey. Nash v. Jeffes, 739 F.3d 878, 884 (3rd Cir. 1984). Where the failure to strictly comply is the fault of one the jurisdictions involved rather than the prisoner, technical compliance is excused. See, Schofs v. Warden, FCI, Livington, 509 F. Supp 78, 82 (E.D.Ky. 1981); United States v. Hutchins, 489 F. Supp. 710, 714-15 (N.D. Ind. 1980). See also Pittman v. State, 301 A.2d 509 (Del. 1973), State v. Wells, 186 N.J. Super 497, 453 A.2d 236 (App. Div. 1982).

Respondent Nash wrote a series of letters to the Mercer County Prosecutor's office and to Judge Moore during the period April 1979 through August 1979 requesting the State to provide a probation revocation hearing. Nash v. Carchman, 558 F. Supp. 641, 647 (D.N.J. 1983). The Court of Appeals found that "Nash's letters were being treated as a request for disposition of the probation violation charge," by the State of New Jersey. Nash v. Jeffes, 739 F.2d 878, 875 (1984). Thus, Nash was found to have complied with the first prong of the notice requirement.

In a letter dated August 3, 1979, Mercer County officials advised Mr. Nash that:

> "As soon as you are assigned a Public Defender in New Jersey, there will be a hearing in the court of the Honorable Richard S. Barlow, Jr."

Nash v. Carchman, 558 F. Supp. 641, 647 (D.N.J. 1983). On the basis of this letter, the court concluded that "Nash was justified in taking no further action," and that the 180 day period for adjudication of the probation violation charge began running on August 3, 1979." Nash v. Jeffes, supra,at 885.

Although Respondent Nash complied with the formal notice requirements on December 6, 1979 by providing the State of New Jersey with the standard forms ordinarily used to make a request, by that time, as the District Court had noted, he had been "led to believe that . . . an effective demand for final disposition of the pending charges " had been made by the representation made to him in the August 3 letter. Nash v. Jeffes, supra, at 885.

The State of New Jersey failed to provide a hearing within the time period prescribed by the statute. Although the State had arranged for a transfer of custody to take place on December 20, 1979 at Dallas Prison, the transfer never took place because Mr. Nash was confined at Graterford Prison. The State's insinuation that Mr. Nash should be held accountable for the bungled transfer attempt is absurd. Regardless of the effort the State made to take custody of the prisoner, the State did not provide a hearing within the allowable time period. N.J.S.A. 2A:159A-3(a) and 3(d).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the petitions for writ of certiorari.

Respectfully submitted,
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No. 84-776

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

PHILIP S. CARCHMAN,
Mercer County Prosecutor,
Petitioner,

v.

RICHARD NASH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

(All counsel listed on inside cover.)

Petition For Certiorari (84-835) Filed November 20, 1984
Petition For Certiorari (84-776) Filed November 5, 1984
Certiorari Granted January 14, 1985

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2- 9-81	1	Order transferring action from Middle Dist. of Pennsylvania, filed, with the following documents enclosed:
	1a	Memorandum
	1b	Petition for writ of habeas corpus
	2	Order re in forma pauperis
	3	Petitioner's letter
	4	Statement re prison account
	5	Order re rule to show cause
	6	Letter of Mercer County Prosecutor
	7	Petitioner's reply
	8	Amendment to petitioner's reply
	9	Memorandum re amendment to petition
	10	Order for amendment to petition
	11	Petitioner's letter dated 11-20-80
	12	Amended petition for writ of habeas corpus
2- 9-81	13	Notice of Allocation and Assignment filed. (Trenton-Debevoise)
2-11-81	14	Order directing respondent Prosecutor of Mercer County to answer petition for writ of habeas corpus not later than 3-16-81 filed. 2-11-81. (Devine)
3-26-81	15	*Answer filed.* (state court proceedings submitted)
3-27-81	16	Certificate of service filed.
3-31-81	17	Report and recommendation filed. (Devine) (copies mailed)
4- 2-81	18	Plaintiff's motion for affidavit of default filed.
4- 8-81	19	Petitioner's objections to Magistrate's report and recommendation, filed
5-20-81	20	Supplement to petitioner's objections to Magistrate's report and recommendation, with proof of service annexed thereon, filed

DATE	NR.	PROCEEDINGS
6-23-81	21	Plaintiff's letter date 5-12-81 to Judge Debevoise, filed
6-25-81	22	OPINION filed 6-24-81. (Debevoise) (copies mailed)
6-25-81	23	Order directing Prosecutor of Mercer County to file a statement within 30 days and denying petitioner's motion for entry of default filed 6-24-81. (Debevoise) (copies mailed)
7-21-81	24	STATEMENT, with verification and certificate of service annexed thereon, filed 7-20-81
7-27-81	25	Order staying action pending completion of certain state court proceedings filed 7-24-81. (Debevoise) (copies mailed)
7-29-81	26	Petitioner's objections to respondents' reply to court mandate filed
8- 3-81	27	Order terminating action administratively without costs filed. (Debevoise) (copies mailed)
3-15-82	28	Plaintiff's motion to terminate stay and resume jurisdiction filed
4- 1-82	29	Certificate of service filed 3-29-82
4- 7-82		At call for hearing on pltf's motion to terminate stay and resume jurisdiction, the court reported motion to be decided on papers submitted pursuant to Rule 78. (Debevoise) (4-5-82)
4-13-82	30	Letter of plaintiff re: plaintiff's motion to terminate stay and resume jurisdiction filed 4-12-82

DATE	NR.	PROCEEDINGS
4-14-82	31	OPINION filed 4-12-82. (Debevoise) (copies mailed)
4-14-82	32	Order denying petitioner's motion to stay proceedings filed 4-12-82. (Debevoise) (copies mailed)
12- 9-82	33	Writ of habeas corpus as to pltf., on 12-28-82, filed. (Debevoise) copies to USM
1- 7-83	34	Order reinstating matter to trial list, filed 1-6-83. (Debevoise) (notice mailed)
1-13-83	35	Order of U.S.C.A. designating Philadelphia, Pennsylvania on 1-4-83 as designated place for hearing on petition for writ of habeas corpus filed 1-12-83. (Aldisert) (copies mailed)
1-17-83	36	Order Re-allocating case from Trenton to Newark filed. (Debevoise) (Notice Mailed)
3- 8-83	37	Opinion, filed 3-7-83. (Debevoise) (Granting petition for Writ of Habeas Corpus) copy to N.J. L. J.
3-23-83	38	Order granting petitioner's petition for Writ of Habeas Corpus, without costs, filed 3-21-83. (Debevoise) (notice mailed)
4- 7-83	39	Defendant's Notice of Appeal filed 4-4-83 at 3:55 p.m.
4- 7-83		Copies of defendant's notice of Appeal sent to U.S.C.A., Richard Nash, and James A. Waldron, Jr.
4-11-83	40	Copy of transcript purchase Order of habeas corpus hearing taken 1-4-83 at the U.S. Court House in Philadelphia, filed 4-8-83

DATE	NR.	PROCEEDINGS
5- 4-83	41	*Transcript* or hearing taken 1-4-83 in Philadelphia, filed 5-2-83
5- 4-83	√	*Record Complete for purposes of appeal*

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.

ATTEST:
ALLYN Z. LITE, Clerk
United States District Court
District of New Jersey

By Laini Ann Orr
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UNITED STATES COURT APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-5261.

Civil Action

RICHARD NASH,

Petitioner-Appellee,

v.

GLEN R. JEFFERS, PHILLIP S. CARCHMAN,
Mercer County Prosecutor,

Respondent-Appellant.

STATE OF NEW JERSEY]
] ss.
COUNTY OF MERCER]

AFFIDAVIT OF DEBORAH A. HANSEN

DEBORAH A. HANSEN, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am currently employed by the State of New Jersey as Chief of the Bureau of Interstate Services, within the Department of Corrections. I am responsible for the administration of the various Compacts, Agreements and Acts, including the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.*, that pertain to the interstate

movement of fugitives and parolees. I have held this position for over four years.

2. I have been employed in the Department of Corrections for ten years. Prior to my employment as Chief of the Bureau of Interstate Services, I was employed as a supervisor within the Bureau of Interstate Services and before that as a Parole Officer in the Interstate Unit of the Bureau of Parole. When the Department of Corrections was reorganized in 1976, the Interstate Unit of the Bureau of Parole became the current Bureau of Interstate Services. My responsibilities in these positions included lodging parole violation warrants and handling all correspondence from parolees incarcerated out-of-State.

3. Whenever a New Jersey parolee is subsequently convicted of a crime and incarcerated out of State, it is the practice of the Department of Corrections to lodge a parole violation warrant detainer at the institution in which the parole violator is serving his sentence. The Department executes the warrant when the parolee is paroled or otherwise released from the out-of-State facility. An adult prison inmate is returned pursuant to the provisions of the Uniform Criminal Extradition Law, *N.J.S.A.* 2A:160-1 *et seq.*, or, where applicable, pursuant to the Uniform Act for Out-of-State Parolee Supervision, *N.J.S.A.* 2A:168-14 *et seq.*

4. The above described practice has been followed by the Department of Corrections for the 10 years I have been employed by it.

5. In support of the Department's motion to intervene I indicated that based upon the records most readily accessible at the time, it was my best estimate that the

Department had filed approximately 700 parole violation warrant detainers with other jurisdictions.

6. Since the time when the motion to intervene was filed and at the request of the Attorney General's Office, Department of Law and Public Safety, I have conducted a more thorough review of our records. While this review is not yet complete, I have been able to ascertain that of the approximately 700 warrants recorded as being filed, approximately 300 to 310 of these are parole violation warrants filed against inmates serving a term of imprisonment in another jurisdiction. The remainder of the 700 parole violation warrant detainers recorded as filed are filed against pre-trial detainees, and my understanding is that they are, therefore, not subject to the provisions of the Interstate Agreement; or warrants filed against a pre-trial detainee who is currently out on bail; or apprehension requests. In addition, all detainers lodged against parole violators serving a term of imprisonment in another jurisdiction were reviewed and, in some cases where the circumstances warranted, for example, in a case where the parole violator was subsequently sentenced to death, or sentenced to serve consecutive life terms, the Department has withdrawn its detainer. Finally, due to clerical error, some of the 700 warrant detainers recorded as being filed had in fact already been cancelled.

7. Because this review was extensive and because of limited manpower, I have been unable to compile information concerning the number of inquiries made by inmates subject to a parole violation detainer. My experience is that we routinely receive inquiries once an inmate is informed that the Department has lodged a detainer against him.

8. The cost of returning a parole violator to New Jersey varies depending upon where the parole violator is and the form of transportation used to return him to New Jersey. For example, returning a parole violator from Los Angeles may cost anywhere from approximately $1600.00, if the inmate is returned via a private security air transport firm, to $2200.00 if the inmate is returned via a commercial airline. In the former case, the fee is a package deal with the private security firm providing the personnel and the transportation from the California prison to a New Jersey airport. In the latter case, the Department must send two security guards out to Los Angeles to return the parole violator. The estimate given above, therefore, includes the round trip airfare for two employees, as well as the one-way airfare for the parole violator. Housing and meals for the security guards as well as the cost of transporting the parole violator from the prison to the airport are also included. By comparison, the cost of returning a parole violator from Graterford Prison in Pennsylvania is approximately $75.00. This figure includes gas, tolls, and meals.

9. The budget for transporting State prison inmates back to New Jersey during fiscal year 84 is $30,000. This is the total amount allocated to return not only parole violators to New Jersey, but escapees, juvenile runaways and all inmate transfers as well.

/s/ Deborah A. Hansen

Sworn and subscribed to
before me on this 20
day of September, 1983.

/s/ Catherine M. Brown

No. 84-835 (3)
No. 84-776 (2)

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

PHILIP S. CARCHMAN,
Mercer County Prosecutor,
Petitioner,

v.

RICHARD NASH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER PHILIP S. CARCHMAN, MERCER COUNTY PROSECUTOR

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31pp

QUESTION PRESENTED FOR REVIEW

Whether the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* applies to a detainer based on a violation of probation or parole?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Philip S. Carchman, Mercer County Prosecutor, Appellant
2. State of New Jersey, Department of Corrections, Intervenor
3. Richard Nash, Appellee

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State v. Richard Nash, No. A-2711-76, (N.J. App. Div., filed December 11, 1978).

STATEMENT OF JURISDICTION

The United States District Court had subject matter jurisdiction over the proceedings below pursuant to 28 *U.S.C.* Sec. 2254. The United States Court of Appeals for the Third Circuit had jurisdiction to review the final judgment of the District Court pursuant to 28 *U.S.C.* Sec. 1291. The Circuit Court's opinion was filed and judgment was entered on July 10, 1984. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. The mandate was filed on September 4, 1984. A Petition for Writ of Certiorari was filed on November 5, 1984, and granted on January

14, 1985. This Court has jurisdiction to review the Circuit Court's judgment pursuant to 28 *U.S.C.* Sec. 1254(1).

RELEVANT STATUTE

Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.*

(Reproduced in Appendix to Petition for Writ of Certiorari)

STATEMENT OF THE CASE

On January 3, 1975, a Mercer County Grand Jury returned Indictment 495-74 charging Richard Nash with Breaking and Entering With Intent to Rape, *N.J.S.A.* 2A:94-1, and Assault With Intent to Rape, *N.J.S.A.* 2A:90-2.

On June 21, 1976, defendant Nash entered a *retraxit* plea of guilty to both counts of Indictment 495-74. Pursuant to a plea agreement, the State made no recommendation as to the sentence and agreed not to request that bail be increased at the time of the plea. On October 29, 1976, defendant Nash was sentenced to an aggregate term of 36 months in the Mercer County Correction Center, 24 months suspended, and two years probation.

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the sentence was manifestly excessive, unduly punitive, and an

abuse of the trial judge's discretion. On December 11, 1978, the Appellate Division denied Nash's appeal.

On June 13, 1978, while still serving the probationary portion of his New Jersey sentence, defendant Nash was arrested in Montgomery County, Pennsylvania for Burglary, Involuntary Deviate Sexual Intercourse, and Loitering. Subsequently, on June 21, 1978, the Mercer County Probation Department filed a detainer against defendant Nash charging him with a violation of probation.

On March 14, 1979, defendant Nash was convicted in Pennsylvania of Burglary, Involuntary Deviate Sexual Intercourse and Loitering. On July 13, 1979, the Pennsylvania Court sentenced the defendant to a minimum of 5 years and a maximum of 10 years to be served at the State Correctional Institution at Dallas, Pennsylvania.

On April 13, 1979, three months before he was sentenced for his Pennsylvania convictions, defendant Nash sent a letter to the Mercer County Prosecutor's Office in which he contested the validity of his Pennsylvania convictions. Defendant Nash asked for advice in the letter as to what he should do in reference to the New Jersey probation violation detainer. However, the letter makes no specific reference to the Interstate Agreement on Detainers. On May 16, 1979, the Prosecutor's Office responded by letter to defendant Nash. The letter advised him to contact his probation officer as the Prosecutor's Office had no jurisdiction over the case at this point.

On May 17, 1979, defendant Nash wrote to the Mercer County Probation Department and requested assistance

with regards to his probation violation detainer. On May 23, 1979, Probation Officer Robert Hughes responded to defendant Nash by letter. Probation Officer Hughes indicated that he had spoken with the Honorable A. Jerome Moore, J.S.C., who stated that no action could be taken on the detainer until defendant Nash was sentenced on the Pennsylvania charges. Probation Officer Hughes suggested that Nash contact the Probation Department after his Pennsylvania sentencing date.

On July 20, 1979, one week after his Pennsylvania sentencing, defendant Nash again wrote to the Mercer County Probation Department and requested that action be taken on the probation violation detainer as soon as possible. Probation Officer Judith Giordano replied by letter dated August 3, 1979, in which she stated that a hearing on the probation violation would be held as soon as an attorney from the Public Defender's Office was appointed to represent him. She further indicated that if defendant Nash did not hear from the Public Defender's Office within one week, he should write to them. When defendant Nash was not contacted by that office, he wrote again to Probation Officer Giordano with a copy of the letter sent to the Public Defender. Defendant Nash's two page letter once more contested the validity of his Pennsylvania conviction and only made reference to his New Jersey detainer in the last sentence.

Defendant Nash, by his own admission, received a Sentence Status Report from the Pennsylvania authorities on August 17, 1979. This report informed defendant Nash of his outstanding probation violation detainer and advised him of the proper procedure to dispose of his detainer under the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* (IAD).

Defendant Nash took no action until November 5, 1979, when he sent a letter to Mr. Harold Holloway, Chief Probation Officer, requesting final disposition of the probation violation detainer pursuant to the Interstate Agreement on Detainers. On the same day, defendant Nash sent a letter to the Honorable George Y. Schoch, A.J.S.C., and enclosed a copy of his letter to Chief Probation Officer Holloway. On November 13, 1979, Judge Schoch referred defendant Nash's letters to the Mercer County Prosecutor's Office with a note suggesting that Nash was "invoking the terms of the Interstate Agreement on Detainers Act . . ."

On December 6, 1979, defendant Nash executed Form II of the Interstate Agreement on Detainers formally requesting transfer to Mercer County to dispose of the charge of violation of probation. This form was forwarded to Mercer County along with supporting documents, including Form IV of the Interstate Agreement on Detainers, and an offer by the Pennsylvania authorities to deliver temporary custody of defendant Nash to the Mercer County authorities.

On December 14, 1979, the Mercer County Prosecutor's officer responded to the request by sending Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, Pennsylvania. This form authorized the Mercer County Sheriff's Office to take custody of defendant Nash on December 20, 1979. The Mercer County Sheriff's Officers arrived in Dallas, Pennsylvania on the appointed date but were informed for the first time that as of December 11, 1979, defendant

Nash had been temporarily moved to a penal institution at Graterford, Pennsylvania.[1]

On February 28, 1980, the Mercer County Prosecutor's Office sent another Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, defendant Nash having been returned there on February 26, 1980. The new Form VI designated March 10, 1980 as the date when the Mercer County authorities would take custody of defendant Nash.

Defendant Nash reacted by refusing to sign the additional papers required to allow the transfer to New Jersey. Rather, on March 6, 1980, Nash filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. An amended petition was filed on December 9, 1980. Pursuant to 28 *U.S.C.* 1406, the case was transferred to the United States District Court for the District of New Jersey on February 3, 1981. (App. 101) On March 26, 1981, the Mercer County Prosecutor's Office filed an answer to defendant Nash's habeas petition.

On June 24, 1981, the Honorable Dickinson R. Debevoise, U.S.D.J., ordered the Prosecutor's Office to provide the court with specific information regarding defendant Nash's state court remedies. (App. 95) This information was provided on July 20, 1981; subsequently, on July 24, 1981, Judge Debevoise ordered that Nash's federal action be stayed until the completion of the state court proceedings available to him. (App. 81)

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[1] Given that the officers possessed a writ for defendant issued to the warden of the Dallas Prison, they had no authority to proceed to Graterford to take custody of him there.

On August 24 and 25, 1981, the Honorable Richard J.S. Barlow, Jr., J.S.C., held a hearing in which he denied defendant Nash's motion to dismiss the probation violation detainer. In addition, Judge Barlow ruled that Nash's Pennsylvania convictions constituted a violation of probation. (App. 58) On October 9, 1981, defendant Nash was resentenced on Indictment 495-74 to consecutive 18 month sentences at the Mercer County Correction Center. (App. 77)

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the State failed to dispose of the probation violation detainer within the time limits imposed by the Interstate Agreement on Detainers. The Appellate Division denied the appeal (App. 44); a petition for certification to the New Jersey Supreme Court was denied on November 12, 1982. (App. 43)

Having fully exhausted his state remedies, defendant Nash's federal habeas proceeding was returned to the trial list. On January 4, 1983, Judge Debevoise held a hearing on the matter at the United States Court House in Philadelphia. The District Court had subject matter jurisdiction pursuant to 28 *U.S.C.* Sec. 2241 and 28 *U.S.C.* Sec. 2254. On March 7, 1983, Judge Debevoise issued his opinion granting defendant Nash's petition and declaring his conviction a nullity. (App. 21) *Nash v. Carchman*, 558 *F. Supp.* 641 (D.N.J. 1983). Judge Debevoise ruled that the Interstate Agreement on Detainers extends to a probation violation detainer and, furthermore, that the State violated defendant Nash's rights under the statute. An order to this effect was entered on March 21, 1983.

Philip S. Carchman, Mercer County Prosecutor, appealed to the United States Court of Appeals for the Third Circuit. The Circuit Court had jurisdiction to review an appeal from a final judgment pursuant to 28 *U.S.C.* Sec. 1291. Since the District Court framed the issue in terms of probation and parole violation detainers, 558 *F.Supp.* at 643, the State of New Jersey Department of Corrections successfully sought intervention on the basis that it has legal custody over parolees released from the New Jersey State Prison System. *See N.J.S.A.* 30:4-123.59(a). The Court of Appeals affirmed the judgment of the District Court; the Court's opinion was filed and judgment was entered on July 10, 1984. *Nash v. Jeffes,* 739 *F.*2d 878 (3rd Cir. 1984). A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. (App. 103) The mandate was filed on September 4, 1984. (App. 105)

Philip S. Carchman, Mercer County Prosecutor, filed a Petition for Writ of Certiorari on November 5, 1984. The State of New Jersey Department of Corrections filed a Petition for Writ of Certiorari on November 20, 1984. The Court consolidated both cases and and granted the petitions on January 14, 1985.

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SUMMARY OF ARGUMENT

The Interstate Agreement on Detainers *N.J.S.A.* 2A:159A-1 *et seq.* permits a prisoner incarcerated in one state against whom a detainer has been lodged based on an untried indictment, information or complaint

from another state, to request to be returned to such state to answer the pending charge. The issue arises as to whether detainers based on probation or parole violations are within the scope of the Act.

The plain language of the Act indicates that probation or parole violation detainers are outside the scope of the Act. The statute refers to detainers based on an "untried indictment information or complaint." In the case of a probation or parole violation detainer, there is nothing to be tried. The defendant has already been tried on the underlying charge and is before the court as part of the sentencing process.

Secondly, the purpose of the Act supplies the reason as to why its drafters limited the scope to detainers based on untried indictments, information or complaints. The statute is not designed to dispose of all detainers; indeed, many detainers are based on new convictions for which the prisoner must return to serve his sentence. The statute is designed to ensure that detainers that are lodged have a valid underlying charge. Given that detainers may have adverse effects on a prisoner's rehabilitative prospects, the Act ensures that the detainers that are lodged have a valid basis. The concern, obviously, is over detainers based on charges that have not yet been tried. On the other hand, a detainer based on a probation or parole violation is always valid per se since the new conviction conclusively establishes the violation.

Finally, while the Act is also designed to effectuate a prisoner's right to a speedy trial, this concern is directed towards detainers based on charges that have not yet been tried. The right to a speedy trial is not implicated with a

probation violation. Additionally, since the new conviction conclusively establishes the violation, there is no risk of unfair delay.

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ARGUMENT

The Interstate Agreement On Detainers Does Not Apply To Detainers Based On Violations Of Probation Or Parole.[2]

POINT ONE: The Plain Language Of The Act Excludes Detainers Based On Probation Or Parole Violations.

In response to the problem of detainers based on untried charges lodged by authorities in one jurisdiction against prisoners incarcerated in another, the Interstate Agreement on Detainers was drafted to provide for a uniform and orderly system for disposing of such detainers promptly and efficiently. The IAD is "congressionally sanctioned interstate compact the interpretation of which

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[2] It is unclear whether or not the Circuit Court's opinion applies to parole as well as probation violation detainers. Although the facts of this case involve only a probation violation detainer, the District Court framed the issue as whether the Act applied to "a charge of parole or probation violation," *Nash v. Carchman*, 558 *F.Supp.* 641, 643 (D.N.J. 1983). This was the basis for intervention by the New Jersey Department of Corrections when the case was pending before the Circuit Court. The Circuit Court affirmed the decision for the District Court; the Court did not address the distinction, if indeed there is any in this context, between probation and parole, but held that "a probation violation is covered by the Act." *Nash v. Jeffes*, 739 *F.2d* 878, 884 (3rd Cir. 1984). The New Jersey Department of Corrections nevertheless petitioned this Court for a writ of certiorari (No. 84-835). This petition was granted on January 14, 1985.

presents a question of federal law." *Cuyler v. Adams*, 449 *U.S.* 433, 442 (1982). In addition to having been enacted into federal law, the Act has also been adopted by forty-eight states and the District of Columbia.

It is provided in Article III of the IAD that:

> [w]henever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any *untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner,* he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. . .

N.J.S.A. 2A:159A-3(a) (emphasis added).

Article III of the IAD, by its own terms, does not apply to all detainers lodged against a prisoner, rather it only applies to those detainers based on an "untried indictment, information or complaint." In *United States v. Roach*, 745 *F.2d* 1252 (9th Cir. 1984), the Ninth Circuit found the language of Article III to be clear and unambiguous:

> The words "indictment," "information," and "complaint" are terms of art with well-understood meanings in the law. They refer to documents charging an individual with having committed a criminal offense. Used in a statute, they must be accorded that meaning . . . Probation violation charges do not fall within that definition, and Congress did not express an intention to make the Agreement applicable to pro-

> bation violation charges. Therefore, the statutory language must be regarded as conclusive. . .

745 *F.2d* at 1254 (citations omitted).

Other courts which have addressed this issue have resolved it based on the plain language of Article III. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S. 2d* 45 (App. Div. 1982), the court ruled that a probation violation detainer is outside the scope of the IAD because "the violation merely results in resentencing, and does not constitute a new complaint." 453 *N.Y.S. 2d* at 47. Similarly, in *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn. App. 1976), the court reasoned that:

> [t]he term "untried" refers to matters which can be brought to a full trial. In a probation revocation proceeding the trial has already been held and the defendant has been convicted. In such a hearing, the defendant comes before the court in a completely different posture than he does at his trial before conviction.

546 *S.W.2d* at 829.

Such an analysis reflects the view that a probation violation hearing or a parole revocation hearing are simply extensions of the sentencing process rather than new complaints to be "tried." The fact that Article III uses the adjective "untried" to modify the words "indictment, information or complaint" was central to the Arkansas Supreme Court's reasoning that a probation violation detainer is not covered by the IAD. In *Padilla v. Arkansas,* — *S.W.2d* — (Ark., No. CR 83-45, April 18, 1983), the court reasoned that "[a] charge against a defendant does not remain 'untried' after a defendant has pleaded guilty . . . Since appellant had entered a plea of guilty on the charges

underlying the original sentence of probation, there was nothing 'untried' within the meaning of the [IAD] . . ." slip op. at 3.

With the exception of this case, every court in the land which has addressed this issue has held that probation and parole violation detainers are not "untried indictments, informations or complaints." *United States v. Roach,* 745 *F.2d* 1252; *Hopper v. United States Parole Com'n.,* 702 *F.2d* 842 (9th Cir. 1983); *Sable v. Ohio,* 439 *F.Supp.* 905 (W.D. Okla. 1981); *Hernandez v. United States,* 527 *F. Supp.* 83 (W.D. Okla. 1972); *Cart v. DeRobertis,* 453 *N.E. 2d* 153 (Ill. App. 1983); *Padilla v. Arkansas,* — *S.W.2d* — (Ark. 1983); *Maggard v. Wainwright,* 411 *So.2d* 200 (Fla. App. 1982); *Wainwright v. Evans,* 403 *So.2d* 1123 (Fla. App. 1983); *Suggs v. Hopper,* 215 *S.E.2d* 246 (Ga. 1975); *Buchanan v. Michigan Department of Corrections,* 212 *N.W.2d* 745 (Mich. App. 1973); *People v. Batalias,* 316 *N.Y.S.2d* 245 (App. Div. 1970); *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45 (App. Div. 1982); *State v. Knowles,* 270 *N.E.2d* 133 (S.C. 1980); *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn App. 1976).

By construing Article III so broadly as to include probation violation detainers within its scope, the Circuit Court has effectively substituted its judgment for the judgment of the legislatures of the States which have adopted the Act. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45, the court "recognize[d] that the statute commands a liberal construction . . . , but a judicially created extension to include probation violations extends the scope beyond mere liberal construction . . . Substantive changes should await legislation by the signatory States . . ." 453 *N.Y.S.2d* at 46-47.

Significantly, one state, Kentucky, has amended its version of the IAD to specifically provide for coverage of detainers based on violations of probation and parole. Kentucky Revised Statutes Section 440.455(2) provides that:

> [a]ll provisions and procedures of [the Kentucky IAD] shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole.

A request to dispose of a detainer pursuant to the IAD is made under Article III. The article refers only "untried indictments, informations or complaints." The scope of the statute should be limited to the language employed by the legislature. "[A]ny extension of the coverage of the IAD is not a matter for the judiciary, but rather, falls within the province of the legislative branch, as exemplified by Kentucky's specific amendments to its law to accomplish the designed purposes." *Maggard v. Wainwright*, 411 *So.2d* at 202.

POINT TWO: The Circuit Court Erroneously Interpreted The Legislative History Of The Interstate Agreement On Detainers.

In deciding that the phrase "untried indictment, information or complaint" as used in Article III of the IAD included a violation of probation, the Circuit Court and District Court both relied heavily on the comments of the Council of State Governments which drafted the Act in 1956. Central to the District Court's reasoning, which the Circuit Court found "persuasive," was the Council's statement that:

> detainers may be placed by various authorities under varying circumstances, for example, when an escaped prisoner *or a parolee commits a new crime and is imprisoned in another state.*

Council of State Governments, Suggested State Legislation for 1957 at 74. 558 *F.Supp.* at 545 (emphasis added by District Court).

This language, coupled with the assumption that a detainer based on a probation violation will have the same adverse effects on a prisoner's rehabilitation as any other detainer, led the Circuit and District Courts to conclude that the Act was intended to apply to detainers based on probation violation detainers.

This reasoning, however, misinterprets the comments of the Council and the effect of a detainer based on a violation of probation. The commentary relied upon by the District Court is not a description of the type of detainer to which the Council expected the IAD to apply. Rather, it is a statement contained in a longer paragraph that gives a general definition of a "detainer:"

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new series crimes in different jurisdictions.

Id. at 74.

The above paragraph aptly defines a "detainer," a definition that obviously encompasses a warrant based on a charge of violation of probation or parole. However,

Article III of the IAD does not apply to all detainers; rather, by its express terms, the IAD is limited to "any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner . . ." *N.J.S.A.* 2A:159A-3. If this commentary was meant to describe the scope of Article III, the statute itself would have simply referred to "detainers."

The Council had good reason to limit the scope of Article III. The IAD is not designed, nor can any legislation be designed, to dispose of every detainer lodged against an out-of-state prisoner. Rather, the Act addresses itself to the problem created by a misuse of the detainer system. Such misuse, whether intentional or negligent, arises from the fact that authorities do not need to make any showing whatsoever before a detainer is lodged at their request.

> Since the legal basis for a detainer is rarely examined, a prisoner can suffer loss of privileges and parole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction. Once the detainer is filed by a prosecutor he has no reason to concern himself with the validity of the charge again until the detainee is released by the other jurisdiction. Subsequent discoveries or changes which destroy the basis for the detainer will likely be communicated to the incarcerating authorities only by the most conscientious prosecutors.

Note, *Detainers and the Correctional Process,* 4 Wash. U.L.Q. 417, 423 (1966).

Given the adverse consequences that a detainer will have upon a prisoner's rehabilitative prospects, it is obvi-

ously desirable to ensure that such detainers are based upon a valid charge. The Council of State Governments took note of the "statement of aims of guiding principles" promulgated by a group known as the Joint Committee on Detainers which included the statement that "No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made *and it has been found valid.*" Council of State Governments, *supra,* at 75 (emphasis added). Most significantly, Article I of the IAD states that "it is the policy of the party states and the purpose of this agreement to encourage the expiditious and orderly disposition of . . . charges and *determination of the proper status* of any and all detainers based on untried indictments, informations or complaints . . ." *N.J.S.A.* 2A:159A-1 (emphasis added). Indeed, even the court below noted the comments of one writer who indicated that:

> The thrust of [the IAD] is not to protect the convict's right to a speedy trial per se, but rather to protect him from the particular disabilities engendered by an untried detainer pending against him while he is serving a prison term. Often the effect of such a detainer, *which could be based upon an unsubstantiated charge,* is to aggravate the punishment received for the original offense.

Note, *The Right to a Speedy Trial and the New Detainer Statutes,* 18 Rutgers L.Rev. 828, 832 (1964) (footnote omitted and emphasis added), quoted at 739 *F.2d* at 882.[3]

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[3] In discussing the proposed companion legislation regarding disposing of detainers within the state (Intrastate Detainer Statute), the Council of State Governments noted that this stat-

(Continued on following page)

If a prisoner has an out-of-state detainer based upon an untried indictment, information or complaint lodged against him, he may invoke his rights under the IAD to have the underlying indictment, information or complaint adjudicated. This will result in either a new conviction, an acquittal, or a decision by the State not to prosecute. If the trial results in a conviction, then the prisoner is returned to the State in which he is serving his original sentence *with a detainer still lodged against him.* The difference, of course, is that the new detainer is based upon the new conviction, not upon an untried indictment, information or complaint. The IAD will have served its purpose; the prisoner—and the correction officials—now know that the detainer has a valid basis. Furthermore, the prisoner whose trial results in an acquittal or a decision by the State not to prosecute, will be returned to the State in which he is serving his sentence without the detainer lodged against him. Again, the IAD will have served its purpose; the prisoner will not suffer the adverse consequences engendered by a detainer based upon an invalid charge. Thus, it is clear that the IAD is not designed to dispose of all detainers; rather, given that detainers based upon untried indictments, informations or complaints "*produce uncertainties* which obstruct programs of prisoner treatment and rehabilitation," *N.J.S.A.* 2A:159A-1, (emphasis added), the IAD seeks to ensure that a detainer lodged against a prisoner is based upon a valid charge.

(Continued from previous page)

ute gives a prisoner "no greater opportunity to escape just convictions, but *it does provide a way for him to test the substantiality of detainers placed against him* and to secure final judgment on any indictments, informations or complaints outstanding against him in the state." Council of State Governments, *supra,* at 76-77 (emphasis added).

The concern over the validity of the charge underlying a detainer is directed towards those detainers in which the underlying charge has not yet been tried. Thus, the IAD is applicable to those detainers based upon "untried indictments, informations or complaints." Conversely, there is no such concern when the detainer is based upon a violation of probation. A probation violation is conclusively established when the probationer is convicted of subsequent crimes. *State v. Zachowski,* 53 *N.J. Super.* 431, 441-42 (App. Div. 1959). In the present case, given his Pennsylvania convictions, respondent Nash could hardly have been uncertain as to his probationary status. His new conviction conclusively established the violation of his New Jersey probation. Thus, the detainer lodged against him was based on a valid charge. If Nash had been returned to New Jersey immediately to resolve the probation violation, he would have been returned to Pennsylvania after being re-sentenced *with a detainer still lodged against him.* Even if the New Jersey sentence was imposed concurrently with his Pennsylvania sentence, Nash would still have been returned to Pennsylvania with a detainer lodged against him to ensure service of his New Jersey sentence. As a practical matter, Nash's detainer would still be lodged against him whether he could make use of the IAD or not. The IAD is of no use to prisoners faced with a detainer based on a probation violation. Such detainers are always valid since the violation is conclusively established by the new conviction. On the other hand, the IAD is of great value to prisoners facing untried charges. By adjudicating the underlying charge, a prisoner can escape the burdens caused by a detainer based upon an invalid charge. Thus, Article III limits the scope of the Act to those detainers based upon "untried indictments, informations or complaints."

The Circuit Court felt that in a "significant number" of cases, the probation violation charge lodged against the prisoner incarcerated out-of-state would be based not on the new conviction, but rather upon technical, non-criminal violations of the prisoner's probation agreement. 739 *F.2d* at 882 n.7. However, the Act only may be invoked by a person who "has entered upon a term of imprisonment in a penal or correctional institution of a party State . . ." *N.J.S.A.* 2A:159A-3(a). Thus, if a defendant is incarcerated in another state, the probation or parole violation detainer will always be based on the new conviction in that state, rather than on any technical violation of the terms of probation. While there may in fact be other technical violations, in the context of the IAD there will always be a violation based upon the new conviction.

The limiting language of Article III demonstrates that the drafters of the IAD were aware of the qualitative differences between detainers based on "untried indictments, informations or complaints" and those based on violation of probation or parole. The former raise legitimate concerns over final adjudication of guilt or innocence and uncertainties concerning a prisoner's release date both of which will interfere with the rehabilitative process. No such problems are raised by the latter.

POINT THREE: While The Interstate Agreement On Detainers Is Designed To Preserve A Prisoner's Speedy Trial Rights, A Right To A Speedy Trial Is Not Implicated With A Probation Or Parole Violation.

Besides being a mechanism whereby the uncertainty over the validity of a detainer can be alleviated, the IAD

is also designed to effectuate a prisoner's Sixth Amendment right to a speedy trial. Indeed, in *Smith v. Hooey,* 393 *U.S.* 374 (1969), the Court held that an inmate incarcerated out-of-state who has an untried charge pending in another State has a constitutional right to a speedy disposition of that charge.

The IAD itself clearly states that it is the finding of the party States that many of the uncertainties that obstruct prisoner rehabilitation are caused by "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions." *N.J.S.A.* 2A:159A-1. The congressional legislative history surrounding the IAD's enactment into federal law is also illuminating.[4] Senator Hruska sponsored the bill on the Senate floor and declared:

> At the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion—another manner of stating the speedy trial guarantees of the Constitution.

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[4] In *Cuyler v. Adams,* 449 *U.S.* 433, the Court was presented with the question of whether a state prisoner transferred involuntarily under article IV of the IAD had a right to a pre-transfer hearing. The case involved the transfer of a Pennsylvania state prison inmate to New Jersey to answer state criminal charges. In answering the question in the affirmative, the Court looked to the plain language of the Act, the legislative history generated by the Council of State Governments, and the federal legislative history surrounding Congress' enactment of the IAD in 1971. Given that the IAD is a federal law, the federal legislative history is likewise instructive on the issue of whether the IAD applies to probation or parole violation detainers.

116 *Cong. Rec.* 38840. The Senate Committee considering the legislation likewise stated:

> The committee is of the opinion that the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right.

Id. at 38841.

In *Hopper v. United States Parole Com'n,* 702 *F.2d* 842 (9th Cir. 1983), the court dealt with a situation in which the Parole Commission lodged a detainer against a California prisoner for violation of parole. In March 1981, the prisoner requested a transfer to federal custody for a parole revocation hearing. When the hearing had not taken place by December 1981, the prisoner filed a habeas corpus petition alleging, *inter alia,* that the parole revocation charge must be dismissed due to a lack of a timely hearing as required by the IAD. The Ninth Circuit rejected this argument and held "that an unadjudicated parole violator warrant is not a 'complaint' within the meaning of article III. . . ." 702 *F.2d* at 845.

The Court's analysis in *Hopper* focused on the Congressional legislative history. Congress referred to prisoners "convicted on the new charges," 1970 *U.S. Code Cong. & Ad. News* 4865 the "threat of another prosecution," 116 *Cong. Rec.* 38840, and a "request [for] trial." *Id.* at 38841. Additionally, the legislative history made it clear that "Congress was in part addressing their concern with recent Supreme Court cases vacating state charges, where the state had failed to bring a defendant to trial for a number of years while the defendant was serving time in a federal penitentiary." 702 *F.2d* at 846.

This concern for a prisoner's speedy trial rights is logically consistent with the limiting language of Article III. In the case of a probation or parole violation detainer, the speedy trial rights of the prisoner are not implicated. The Circuit Court observed that "[a]lthough there is no constitutional right to a speedy adjudication in probation violation cases, we believe that concern for a fair adjudication, as well as concern for constitutional rights, should inform our interpretation of the IAD." *Nash v. Jeffes,* 739 *F.2d* at 882, n.7.[5] This concern, however, was raised in the context of the probation violation based on a "non-criminal act which is prohibited by the terms of probation" where "the prisoner's opportunity for a fair adjudication may be compromised by delay." *Id.* As discussed earlier, the IAD only becomes relevant when a person is serving a term of imprisonment in another state. Thus, the probation violation in this context will never be based on a non-criminal act; rather, the violation will always be based on the new conviction which results in the out-of-state term of imprisonment Since this conviction conclusively establishes the probation violation, the delay will not pose any risk to the prisoner's fair adjudication of the charge.

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[5] In *Moody v. Daggett,* 429 *U.S.* 78 (1976), the court held that a prisoner serving a sentence for a crime he committed while on parole has no constitutional right to have a parole violation warrant executed promptly when he is serving the sentence for the same sovereign. The court left open the question of a parole violation serving his intervening sentence in another jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully submits that a detainer based on a violation of probation or parole is not within the scope of the IAD, and asks that the decision of the Circuit Court be reversed.

PHILIP S. CARCHMAN
Mercer County Prosecutor

No. 84-835

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER NEW JERSEY DEPARTMENT OF CORRECTIONS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals erred in ruling, in contravention to every other court which has considered the issue, that Article III of the Interstate Agreement on Detainers, an interstate compact entered into by 48 states, the federal government and the District of Columbia, applies to a detainer based upon a charge of probation violation?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Phillip Carchman, petitioner; appellant below

State of New Jersey, Department of Corrections, petitioner herein; intervenor below

Richard Nash, respondent; appellee below

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Federal Court Opinions:

Nash v. Carchman, 558 *F. Supp.* 641 (*D.N.J.* 1983) (P. App. 21)[1] *aff'd sub nom Nash v. Jeffes,* 739 *F.*2d 878 (3d Cir. 1984) (P. App. 1) *reh'g denied* (August 27, 1984) (P. App. 103 to P. App. 104).

State Court Opinions:

State v. Richard Nash, Dkt. No. 495-74 (Law Div. Aug. 24, 1981) (oral opinion) (P. App. 50) *aff'd* Dkt. No. A-778-81T4 (App. Div. June 22, 1982) (unpublished opinion) (P. App. 44) certif. den. Dkt. No. C-161 (N.J. Nov. 12, 1982) (unpublished Order) (P. App. 43 to P. App. 44).

JURISDICTION

The judgment of the Third Circuit Court of Appeals was filed July 10, 1984 (P. App. 105 to P. App. 106). A timely petition for rehearing with a suggestion for rehearing ***in banc*** was denied August 27, 1984 (P. App. 103 to P. App. 104). Jurisdiction of the Court was invoked pursuant to 28 *U.S.C.* § 1254(1) in a Petition for *Certiorari* filed November 20, 1984. *State of N.J. etc. v. Nash,* No. 84-835. The writ was granted January 14, 1985. 53 *U.S.L.W.* 3506 (U.S., Jan. 14, 1985).

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[1] "P. App." refers to Appendix filed simultaneously and bound with the Petition for *Certiorari* submitted by petitioner, Philip S. Carchman. *Carchman v. Nash,* No. 84-776.

STATUTORY PROVISION INVOLVED

Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. [*N.J.S.A.* 2A:159A-3(a)]

STATEMENT OF THE CASE

Richard Nash was serving a New Jersey sentence of probation for the crime of breaking and entering with intent to rape when he was convicted in Pennsylvania and sentenced to a term of imprisonment for the crimes of burglary, involuntary deviant sexual intercourse and loitering (P. App. 4). Because Nash committed a crime

while on probation, the New Jersey Mercer County probation office, which was supervising Nash, lodged a probation violation warrant as a detainer with the Pennsylvania prison authorities (P. App. 4).

Nash subsequently attacked the legality of the detainer lodged against him, claiming that New Jersey was without power to revoke his probation, notwithstanding his commission of a new crime, because the county authorities failed to give him a probation revocation hearing within the time period prescribed in Article III of the Interstate Agreement on Detainers (hereafter referred to as IAD). *N.J.S.A.* 2A:159A-3(a).

Nash initially filed a petition for *habeas corpus* in federal court pursuant to 28 *U.S.C.* § 2254 (P. App. 6). The petition was dismissed for failure to exhaust available state remedies (P. App. 6; P. App. 95 to P. App. 97). In state court, the trial court rejected Nash's claim that his rights under the IAD had been violated. The trial court revoked Nash's probation and imposed an aggregate three-year probation violation term to be served consecutively to his Pennsylvania sentence. (P. App. 6; P. App. 51 to P. App. 80). On appeal, the Appellate Division of Superior Court affirmed and the New Jersey Supreme Court denied certification (P. App. 6; P. App. 43 to P. App. 50).

Nash then refiled his habeas petition in federal court. The district judge ruled that the IAD included within its scope a detainer lodged on the basis of a charge of probation violation. (P. App. 6 to P. App. 7; P. App. 21 to P. App. 42). The court also ruled that Nash had properly invoked the provisions of the IAD, even though he

did not comply with the application procedures set forth in the act (P. App. 21 to P. App. 42). *See also N.J.S.A.* 2A:159A-3. Since New Jersey failed to conduct a probation revocation hearing within the 180 day period indicated in Article III, *N.J.S.A.* 2A:159A-3(a), the federal court vacated Nash's probation violation sentence and ordered Nash's release from state custody (P. App. 4; P. App. 43).

The Third Circuit Court of Appeals affirmed the district court's ruling. Based upon its independent policy analysis, the Third Circuit panel concluded that the benefit to the prisoner of expanding the applicable scope of the IAD to probation violation detainers outweighed any ensuing burden to the charging state (P. App. 1 to P. App. 18). A petition for rehearing with a suggestion that the matter be reheard *in banc* was denied (P. App. 103 to P. App. 104).

This petitioner, the New Jersey Department of Corrections, was given leave by the Third Circuit to intervene on the side of the appellant, the Mercer County Prosecutor (P. App. 18 to P. App. 20). Intervention was sought because, while the Commissioner of the Department of Corrections does not supervise probationers in New Jersey, he is the State's designated administrator of the IAD. *N.J.S.A.* 2A:159A-14.[2] *See also* Department of Corrections Standard 867.E (unpublished regulation) (R. at Appendix to merits brief filed by the Intervenor in the Third Circuit at 9). Intervention was also sought because

[2] The Commissioner has legal custody of and supervision over all parolees released from the New Jersey State prison system. *N.J.S.A.* 30:4-123.59(a).

the district court's ruling in Nash had effectively invalidated the Department's policy that parole or probation violation detainers do not fall within the scope of the IAD. *See Department of Corrections Standard* 867.D (P. App. 106 to P. App. 109) (unpublished regulation) (hereafter referred to as D.O.C. Std.)

The district court had subject matter jurisdiction over the instant action pursuant to 28 *U.S.C.* § 2241 and 28 *U.S.C.* § 2254. The Third Circuit had jurisdiction to review a final judgment pursuant to 28 *U.S.C.* § 1291. A Petition for *Certiorari* was filed with the Court on behalf of the Department of Corrections pursuant to 28 *U.S.C.* § 1254(1). *State of New Jersey, etc. v. Nash,* No. 84-835. The Department's petition was consolidated with that filed by the Mercer County Prosecutor, the appellant below. *Carchman v. Nash,* No. 84-776. The petitions were granted by the Court on January 14, 1985. 53 *U.S.L.W.* 3506. The Department contends that the decision of the Third Circuit does not effectuate legislative intent and should be reversed.

SUMMARY OF ARGUMENT

This case raises the question of whether the phrase which defines the scope of Article III of the IAD: "untried indictment, information or complaint upon which a detainer is based," *N.J.S.A.* 2A:159A-3(a), applies to a detainer based upon a charge of probation violation, or whether the above-quoted phrase restricts the scope of Article III to a detainer based upon an unresolved criminal

charge. The Third Circuit ruled that a probation violation detainer was an untried indictment, information or complaint within the meaning of the IAD; every other court in the country which has considered the issue has ruled that Article III does not apply to a detainer based upon a charge of probation violation or parole violation. *Nash v. Jeffes, supra,* 739 *F.*2d at 881 & n.4. (P. App. 8 & n.4).

The majority view limits the application of Article III, which was designed as a mechanism to allow prisoners to enforce their speedy trial rights, *Cuyler v. Adams,* 449 *U.S.* 433, 436 n.1 (1981), to a criminal charge for which the substantive speedy trial right was already established as a matter of state or federal law. *See, e.g. Smith v. Hooey,* 393 *U.S.* 374 (1969); *N.J. Const.* (1948) Art. I, § 10. The Third Circuit's construction of Article III implicitly creates for a prisoner incarcerated out-of-state a substantive "speedy trial" right to early adjudication of a charge of probation violation, a substantive right which does not otherwise exist for the prisoner as a matter of federal or state law. *Moody v. Daggett,* 429 *U.S.* 78 (1972) (no due process right to immediate execution of a parole violation detainer lodged by the same sovereign); *U.S. ex rel. Caruso v. U.S. Bd. of Parole,* 570 *F.*2d 1150 (3rd Cir. 1978) (no due process right to immediate execution of a parole violation detainer lodged by a different sovereign) *Youth Correc. Institu. v. Smalls,* 172 *N.J. Super.* 1 (App. Div. 1979) (applying the holding of *Moody* in state law context).

The fundamental duty of a court engaged in statutory construction is to construe the statute in a manner which effectuates legislative intent. Here, the legislative history does not support the Third Circuit's finding that

Article III establishes a substantive right to early adjudication of a probation violation charge lodged by an out-of-state jurisdiction. Rather, the evidence is that legislators viewed the IAD as creating no substantive rights. *See e.g.* statement of Senator Hruska during Senate debate of the bill: "[t]his bill makes no charges [sic] in the substantive laws applicable to any criminal prosecutions." 116 *Cong. Rec.* S38840 (daily ed. Nov. 25, 1970).

The commentary to the IAD indicates that the IAD was drafted in order to eliminate misuse of the detainer system. The misuse was that detainers were often lodged based upon charges which had no reasonable factual basis. *See U.S. v. Mauro,* 436 *U.S.* 340, 358 & n.25 (1978). Officials lodging these detainers often had no intention of executing them, *id.,* with the result being that the prisoner was unfairly subjected to the onerous consequences of a detainer which was grounded upon a baseless charge. This abusive practice undermined efforts to rehabilitate the prisoner.

Misuse of the detainer system could only occur in the context of a detainer based upon a criminal charge, because the factual issue of guilt was unresolved. (Indeed, the accused was presumed innocent of the charge). Such misuse could not occur in the context of probation or parole violation, however, because the issue of factual guilt of the violation was conclusively established by the accused's conviction of a new crime and incarceration in another jurisdiction. *See Morrissey v. Brewer,* 408 *U.S.* 471, 490 (1972) (issue of factual guilt of crime committed while on parole need not be relitigated at parole revocation hearing).

Because the legislative history suggests that legislators did not believe that the IAD created a substantive

right to early adjudication of all charges lodged by a foreign jurisdiction and because the commentary to the IAD suggests that the impetus for the development of the IAD was reform of certain abusive practices which could not occur in the context of a detainer based upon probation violation or parole violation charge, the Third Circuit's construction of Article III is inconsistent with the legislative purpose underlying the act. The court failed in its duty, accordingly, to effectuate legislative intent.

Moreover, the Third Circuit's construction of the IAD is based upon a flawed policy analysis. Early adjudication of a probation violation or parole violation charge increases the likelihood that a revocation decision will be made. *Moody v. Daggett, supra,* 429 *U.S.* at 89 ("forcing decision immediately after imprisonment would not only deprive the paroling authority of this information, but since the other most salient factor would be the parolee's recent convictions . . . a decision to revoke parole would often be foreordained."). Since the issue of factual guilt of a charge of probation or parole violation is conclusively established and since early adjudication of these charges involves the expense of an extra round-trip transport of the accused, *Nash v. Jeffes, supra,* 739 *F.*2d at 883 n.10 (P. App. 13 n.10), it is unlikely any legislature intended to require such an expense when the likelihood of a decision to revoke is increased precisely because of early adjudication of the violation charge. For these reasons, therefore, the decision of the Third Circuit should be reversed.

ARGUMENT

No Legislative Body Intended That The IAD Should Apply To A Detainer Based Upon A Charge Of Probation Violation.

The Interstate Agreement on Detainers is an interstate compact currently entered into by 48 states, the District of Columbia and the Federal Government. Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers,* 83 Colum. L. Rev. 975, 975 n. 1 (1983). The Agreement's provisions are interpreted as a matter of federal law. *Cuyler v. Adams,* 449 *U.S.* 433 (1981).

The IAD provides a mechanism which permits the temporary interstate transfer of custody of a prisoner for the purpose of disposing of a pending charge upon which a detainer is based. *See Cuyler v. Adams, supra,* 449 *U.S.* at 436 n. 1. Pursuant to Article III, a request to dispose of such a charge may be made by the prisoner who is subject to the detainer. *N.J.S.A.* 2A:159A-3(a).[3]

A prisoner subject to a detainer invokes Article III by providing the "prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction" with written notice, pursuant to a procedure outlined in the act, of his place of confinement and his request that final disposition be made of the pending charge. *N.J.S.A.* 2A:159A-3(a). Whenever a prisoner properly invokes Ar-

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[3] In New Jersey, the IAD was enacted as part of the State's penal code. *N.J.S.A.* 2A:1-1 *et seq.* The *Title* 2A Criminal Code was repealed in 1979. *N.J.S.A.* 2C:98-2. The IAD, however, was expressly preserved from repeal. *N.J.S.A.* 2C:98-3.

ticle III, the underlying charge upon which the detainer is based must be resolved by the charging state within 180 days of receipt of notice of the request, unless a motion for a continuance is granted, for good cause shown, by "the court having jurisdiction of the matter. . . ." *Id.* In the absence of a continuance, failure of the charging state to dispose of the pending charge within the time period mandated by the IAD requires a dismissal of the charge with prejudice. *N.J.S.A.* 2A:159A-3(d).

The provisions of Article III are applicable only in instances where "there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged. . . ." *N.J.S.A.* 2A:159A-3(a). The Third Circuit ruled that a detainer based upon a charge of probation violation was an "untried indictment, information or complaint" within the meaning of Article III of the IAD and that, hence, New Jersey's failure to provide Richard Nash with a probation revocation hearing within the 180 day time period mandated by Article III necessitated a dismissal of the probation violation charge with prejudice. *Nash v. Jeffes,* 739 F.2d 878 (3rd Cir. 1984) (P. App. 1 to P. App. 18) *reh'g denied* August 27, 1984 (P. App. 103 to P. App. 104). As the court itself acknowledged, its ruling was contrary to that of every other court in the country which had addressed the question of whether Article III of the IAD applied to a detainer based upon a charge of probation or parole violation. *Id.* at 881 & n. 8. (P. App. 8 & n. 4). *See also U.S. v. Roach,* 745 *F.*2d 1252 (9th Cir. 1984) (Article III inapplicable to probation violation detainer); *Clipper v. Md.,* 295 *Md.* 303, 455 A.2d 973 (1983) (Article III inapplicable to probation violation detainer); *Cart v.*

DeRobertis, 453 *N.E.* 2d 153 (Ill. App. Ct. 1983) (Article III inapplicable to a parole violation detainer).

In terms of a textual reading of the language of Article III, the difference between the Third Circuit's analysis and that of the majority view is that the Third Circuit considers the phrase "untried indictment, information and complaint" to be an all-inclusive one, referring to any charge that is unresolved, regardless of whether the charge is for commission of a crime or for probation violation or for parole violation. The majority of courts interprets that same phrase to be a limiting one, confining the scope of Article III to detainers based only upon an unresolved criminal charge. This case turns, therefore, on a question of statutory interpretation; namely: what type of unresolved charge upon which a detainer can be based is referred to in the phrase "untried indictment, information or complaint. . . ." *N.J.S.A.* 2A:159A-3(a).

The Court has long held that the essential function of a court called upon to construe a statute is "to give effect to" the intent of the legislature. *See, e. g., U.S. v. American Trucking Assoc.,* 310 *U.S.* 534, 543 (1939); *Dickerson v. New Banner Institute, Inc.,* 460 *U.S.* 103, 118 (1983). In ascertaining legislative intent it may be appropriate in some instances to view the statute in the context of the historic surroundings which provided the impetus for legislation. As Justice Frankfurter noted:

> the meaning of . . . a statute cannot be gained by confining inquiry within its four corners. ***Only the historic process of which such legislation is an incomplete fragment — that to which it gave rise as well as that which gave rise to it — can yield its true meaning.*** [*U.S. v. Monia,* 317 *U.S.* 424, 432 (1943) (dissenting opinion) (emphasis added)].

The Third Circuit confined its review of the available extrinsic evidence to the commentary to the IAD prepared by the Council of State Governments. *Nash v. Jeffes, supra,* 739 *F.*2d at 882 (P. App. 10). This petitioner, the Department of Corrections, (hereafter referred to as Department) submits that the court's review was too limited in scope to provide it with the complete contextual backdrop necessary to obtain a clear view of the legislative purpose sought to be achieved by means of the IAD. *See Cass v. U.S.,* 417 *U.S.* 72, 78-9 (1974) (clearly relevant extrinsic materials should be reviewed in order to ascertain statutory meaning). Since the IAD was drafted in 1956 and since it was enacted by New Jersey in 1959, more than twenty-five years ago, the Department submits that in construing the IAD it is appropriate first to look, as Justice Frankfurter put it, to "the historic process" which gave rise to the IAD.

The practice of filing detainers with out-of-state jurisdictions developed as an administrative response to a series of problems confronted by criminal justice officials. While the commission of crime recognized no jurisdictional boundary, the jurisdiction of the criminal justice system was balkanized among the 50 sovereign states, the Federal government and the District of Columbia. As one commentator explained:

> If a person suspected of crime by the authorities of one jurisdiction is apprehended and imprisoned by those of another jurisdiction for other crimes, certain problems in administering criminal justice arise. The problems are caused by the inability of one member of our federal system to compel another's surrender of its prisoner for trial, and the trouble and expense which would be involved if the prisoner were transported for trial to all jurisdictions which wanted him.

> These difficulties have given rise to the detainer system. The jurisdiction desiring custody files a detainer with the jurisdiction holding the prisoner. This detainer, or hold order, has two functions; it notifies the incarcerating authorities that the prisoner is wanted in the other jurisdiction, and it requests that the authorities desiring custody be forewarned of the prisoner's release date so they can arrange to pick him up at the institution. Thus, the incarcerating authority releases the prisoner into the custody of an agent of the requesting authority, who, by formal extradition proceedings, or more often, their waiver by the prisoner, returns him to the requesting jurisdiction. [Note, *"Detainers and the Correctional Process,"* 4 *Wash. U.L.Q.* 417, 417 (1966) (footnote omitted) (hereafter referred to as Washington Note)].

The use of detainers was widespread. It was estimated that in 1945 nearly twenty percent of all federal prisoners had a detainer lodged against them. Bennett, *"The Last Full Ounce,"* 23 Fed. Prob. No. 2, 20, 20-21 (1959) (hereafter referred to as Bennett). It was estimated that in 1971 thirty percent of all federal prisoners had detainers filed against them, that twenty-two percent of California's inmates did and that twenty-five percent of Vermont's and Georgia's inmates did. Dauber, *Reforming the Detainer System: A Case Study,* 7 Crim. L. Bull. 669, 670 (1971) (hereafter referred to as Dauber).

Detainers are filed for a variety of reasons. The bulk however, fall into one of three categories. The first is the criminal charge detainer, which is filed against an inmate who has an untried criminal charge pending. *Id.* at 677. The second is the consecutive sentence detainer, which is filed when an inmate serving time in one jurisdiction has already been convicted and been given a consecutive sentence for a crime committed in another jurisdiction. *Id.*

at 678. The third is the parole or probation violation detainer, which is filed when an inmate who, while on parole or probation in one jurisdiction, is convicted and incarcerated for commission of a criminal offense in another jurisdiction. *Id.* at 680.

As detainer practice developed, so did the belief that an inmate against whom a detainer had been lodged posed an escape risk. *See Bennett,* 23 Fed. Prob. No. 2 at 21. Such an inmate, therefore, was often denied minimum custodial status and the right to participate in work or rehabilitative programs for which minimum custodial status was a prerequisite. *Nash v. Jeffes, supra,* 739 *F.*2d at 882-3 (P. App. 11). While practice was not uniform, in some jurisdictions an inmate could also be denied parole or commutation of sentence simply because a detainer was filed against him. *Id.*[4]

Detainer practice was informal and unregulated. Detainers were filed routinely, often by minor law enforcement personnel and usually without judicial authorization. *See U.S. v. Mauro,* 436 *U.S.* 340, 358 & n. 25 (1978). In the case of a detainer based upon a new criminal charge, it did not need to be supported by an indictment, or information or complaint or by any minimally adequate showing that there existed a valid legal or factual basis to support the charge. Washington Note, 4 *Wash. U.L.Q.* 417, 417-18; Wexler and Hershey, *Criminal Detainers in a nutshell,* 7 Crim. L. Bull. 753, 753-54 (1971) (hereafter referred to as Wexler). Finally, filing a detainer did not bind the requesting authority to subsequently execute the detainer. *Bennett,* 23 Fed. Prob. No. 2 at 21. It was estimated that only one-half of the criminal charge detainers filed by prosecutors were ever actually executed. 11 *Uniform Laws Annotated,* 321, 322 (1974).

[4] Under certain circumstances the New Jersey Department of Corrections will not grant minimum custody status to an inmate against whom a detainer is filed. *D.O.C. Std.* 853.5(D) (R. at Appendix to Intervener's merits brief at 25a to 26a.)

Because a detainer could be lodged without any showing by the charging party that there existed a valid basis for filing the criminal charge, the detainer system was ripe for misuse. As one commentator noted:

> Since the legal basis for a detainer is rarely examined, a prisoner can suffer loss of privileges and parrole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction. Once the detainer is filed by a prosecutor he has no reason to concern himself with the validity of the charge again until the detainee is released by the other jurisdiction. Subsequent discoveries or changes which destroy the basis for the detainer will likely be communicated to the incarcerating authorities only by the most conscientious prosecutors. [Washington Note, 4 *Wash. U.L.Q.* at 423 (footnotes omitted). *See also U.S. v. Mauro, supra,* 436 *U.S.* at 358 n. 25].

Misuse of the detainer system could never occur whenever a probation or parole violation warrant was filed. The very fact of the parole violator's subsequent conviction and incarceration was conclusive factual evidence of a violation of a condition of parole or probation for which revocation was warranted. *See Morrissey v. Brewer,* 408 *U.S.* 471, 496 (1972) (issue of factual guilt of crime committed which on parole need not be relitigated at parole violation hearing). *See also State v. Serio,* 168 *N.J. Super.*

394, 396 (Law Div. 1979) (issue of factual guilt of crime committed while on probation need not be relitigated). Thus a valid factual basis for filing a probation or parole violation detainer *always* existed. Misuse occurred only with the filing of a detainer based upon a new criminal charge, because the detainer became a mechanism through which one accused of committing a crime could be sanctioned even though the issue of factual guilt of the charge was never proved. This misuse of the detainer system was intolerable because it subjected a man to restrictions for a criminal charge of which he was presumed to be innocent. The prisoner subject to an improperly lodged detainer was powerless, moreover, to do anything about it. As he was incarcerated in a foreign jurisdiction, he was unable to invoke his fundamental right to a speedy trial on the charge. *See* Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions,* 77 Yale L.J. 767 (1968) (hereafter referred to as Yale Note).[5]

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[5] The Sixth Amendment guarantee of a right to a speedy trial was not applicable to the states until 1967. *Klopfer v. North Carolina,* 386 *U.S.* 213 (1967) (Sixth Amendment incorporated into Fourteenth amendment). But forty-three states, including New Jersey, had already recognized such a right in their state constitutions. *See* Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes,* 18 Rutgers L. Rev. 828, 828 (1964) (hereafter referred to as Rutgers Note). *See also N.J. Const.* (1948) Art. I, § 10.

The problem of guaranteeing the speedy trial rights of a criminal defendant was exacerbated whenever the defendant was incarcerated out-of-state. Prior to 1969, there was no mechanism by which such a defendant could exercise his speedy trial right in the charging state. He could not, for example, seek extradition pursuant to the Uniform Criminal Extradition Act, *N.J.S.A.* 2A:160-1 *et seq.*, because the provisions of that Act could not be invoked by him. *See Cuyler v. Adams, supra,* 449

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The first attempt to address the problems just outlined was made in 1948. A Joint Committee on Detainers was formed. *U.S. v. Mauro, supra,* 463 *U.S.* at 350. It consisted of representatives from several national criminal justice and legal organizations including National Association of Attorneys General and the American Bar Association, Section on Criminal Law. *Id.* at n. 16. The Joint Committee did not attempt to draft legislation, rather it recommended several principles which should govern detainer practice. *Id.* at 350-51. The scope of the recommended principles included all aspects of detainer practice. *Id.* The IAD was subsequently drafted under the aegis of the Council of State Governments in 1956, *id.*, and enacted in New Jersey in 1959. *See N.J.S.A.* 2A:159A-1.

When the IAD is viewed in its historical context, it appears the purpose of the act is twofold: to eliminate misuse of the detainer system and to effectuate the right to a speedy trial, which is triggered whenever a criminal charge detainer is lodged against a prisoner incarcerated out-of-state. This twofold purpose is accomplished in Article III by providing the prisoner with a mechanism to enforce his speedy trial right.[6] This mechanism enables the prisoner to force the charging state to prove

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U.S. 436 n. 1. In 1969, the Court ruled as a matter of federal constitutional law that an inmate incarcerated out-of-state who was subject to a criminal charge detainer had a constitutional right to a speedy disposition of that charge. *Smith v. Hooey, supra,* 393 *U.S.* 374.

[6] Article IV provides the prosecuting authority with a mechanism to obtain temporary custody over the prisoner. See *Cuyler v. Adams, supra; U.S. v. Mauro, supra.*

the substantiality of its charge. *See Cuyler v. Adams, supra,* 449 *U.S.* 436 n. 1 ("the Detainer Agreement established procedures under which a prisoner may initiate his transfer to the receiving State and procedures that insure protection of the prisoner's speedy trial right."). The provisions of Article III of the IAD address every issue generated by the right to a speedy trial: how to invoke the speedy trial right, *N.J.S.A.* 2A:159A-3(a); 2A:159A-3(b); the time frame beyond which the right is violated, *N.J.S.A.* 2A:159A-3(a) and the remedy for a violation. *Id.* The promoters of the IAD believed that the end-product of providing the prisoner with a mechanism to enforce his speedy trial right would be that in those instances where the charge was not sustained, the prisoner would no longer be precluded, by virtue of the detainer, from eligibility for reduced custodial status or from participating fully in the rehabilitative programs offered in the prison in which he was housed.

The Third Circuit did not view the purpose of the IAD as reform of detainer practice or as effectuating speedy trial rights of prisoners incarcerated out-of-state. It viewed the purpose of the IAD as primarily rehabilitative. *Nash v. Jeffes, supra,* 739 *F.*2d at 882-83 (P. App. 10 to P. App. 13). It felt that this purpose would be furthered if the IAD were construed to require early adjudication of all unresolved charges, regardless of whether the charge was for commission of a new crime, or for probation violation or parole violation. *Id.* Implicit in the court's analysis is the conclusion that Article III of the IAD creates a substantive right to a "speedy trial," for prisoners subject to probation violation or parole violation detainers, who otherwise have no substantive right

to early adjudication of the violation charges against them.[7]

The Third Circuit found support for its decision in the commentary generated by the Council of State Governments, which it declared was the "most important legislative history of the IAD." *Id.* at 882 (P. App. 10). This commentary does indicate that the filing of a detainer can affect a prisoner's custodial status and, thereby, preclude the prisoner from programs for which minimum custodial status is a prerequisite. Council of State Governments, Suggested State Legislation for 1957 at 74. The commentary also notes that the prisoner can become embittered both by his close custodial confinement in prison and by his uncertain future, with the result that ongoing rehabilitative efforts can be undermined. *Id.* Nothing in the commentary, however, provides any support for the proposition that the purpose underlying the IAD is to create a substantive "speedy trial" right to early adjudication of a detainer based upon a pending charge to which the right to a speedy trial does not otherwise attach.

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[7] A parole or probation violator incarcerated for committing a new crime while on parole has no "speedy trial" right to a revocation hearing during the interval in which he is serving his new sentence. *Moody v. Daggett,* 429 *U.S.* 78 (1976) (No due process right to have parole violation detainer executed promptly when serving an intervening sentence for the same sovereign). *See also U.S. ex rel Caruso v. U.S. Bd. of Parole,* 570 *F.*2d 1150 (3rd Cir. 1978) (no due process right to have parole violation warrant lodged as a detainer executed promptly when serving intervening sentence for different sovereign). Nor has such a substantive right been recognized as a matter of New Jersey state law. *Youth Correc. Institu. Comp. Trustee Bd. v. Smalls,* 172 *N.J. Super.* 1 (App. Div. 1979) (right to timely revocation hearing does not commence until detainer is executed and prisoner is taken into custody as a parole violator).

Certainly, had this advisory group intended to create a substantive right to early adjudication of all unresolved charges rather than just give effect to the pre-existing right of a criminally accused to a speedy trial, the commentary surely would have been explicit on this point.

The legislative history suggests, moreover, that legislators did not believe that they were establishing by means of the IAD a substantive right to early adjudication of all open charges lodged by another jurisdiction. The Senate Report on the IAD notes:

> The agreement on detainers, . . . makes the clearing of detainers possible at the instance of a prisoner who is serving a sentence . . . . The Agreement gives the prisoner no greater opportunity to escape a conviction, but it does provide him with a procedure for bringing about a prompt test of the *substantiality* of detainers placed against him by other jurisdictions. The result is to permit the prisoner to secure a greater degree of certainty as to his future and to enable the prison authorities to plan more effectively for his rehabilitation and return to society. [S. Rep. No. 1356, 91st Cong., 2d Sess 2 (1970) *reprinted in* 1970 U.S. Code Cong. & Ad. News 4864, 4865 (1970) (emphasis added)].[8]

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[8] It is submitted that it is appropriate to consider the legislative history generated by Congress, even though the Third Circuit and the District Court did not. (P. App. 10; P. App. 26 to P. App. 27). While the provisions of the IAD are enforceable against a state only by virtue of that state's legislative enactment of the act, the act's provisions are interpreted as a matter of federal law. *Cuyler v. Adams, supra,* 449 *U.S.* 433. From a methodological standpoint, it is noteworthy that in reaching its decision in *Cuyler,* the Court reviewed Congressional legislative history in construing Article IV of the IAD even though the facts before the Court involved the involuntary transfer of a Pennsylvania state prisoner to New Jersey to answer state crim-

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The House Report makes the same point. H.R. Rep. No. 1018, 91st Cong., 2d Sess. 1-2 (1970).

In discussion of the bill in the Senate, Senator Hruska noted: "[t]his bill makes no charges [sic] in the substantive laws applicable to any criminal prosecution." 116 *Cong. Rec.* S38840 (daily ed. Nov. 25, 1970) (statement of Sen. Hruska). The same observation was made in the House of Representatives: "[t]he agreement on detainers does not affect the applicable law in any criminal case." 116 *Cong. Rec.* H14000 (daily ed. May 4, 1970) (statement of Rep. Poff).

Further, in construing Article IV of the IAD, the Court has noted that except where expressly stated, the IAD does not supplant substantive rights which otherwise exist for the prisoner as a matter of state or federal law. *Cuyler v. Adams, supra,* 449 *U.S.* at 450. In *Cuyler,* the Court was presented with the question of whether a state prisoner transferred involuntarily pursuant to Article IV of the IAD had a right to a pre-transfer hearing which, while not expressly provided for in Article IV, was a pre-existing right afforded the prisoner pursuant to the Uniform Criminal Extradition Act. The Court concluded that he did.

The Court noted that Article IV provided that: "[n]othing in this Article shall be construed to deprive any prisoner of any right which he may have to contest

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inal charges. *Id.* Implicit in the Court's approach is the view that Congressional legislative history is always to be reviewed when construing the meaning of the IAD, even if the Federal Government or the District of Columbia is not a party to the lawsuit before the court.

the legality of his [transfer] . . . ." *Id.* at 449-50. Based upon this provision, the structure of the act and its legislative history, the Court held that (aside from one express exception set forth in Article IV): "prisoners transferred pursuant to the provisions of the Agreement are not required to forfeit any pre-existing rights they may have under state or federal law to challenge this transfer to the receiving State." *Id.* at 450. It is submitted that consistent with *Cuyler,* just as Article IV of the IAD was not intended to *supplant* substantive rights established elsewhere as a matter of state or federal law, Article III of the IAD was not intended to *create* substantive rights not elsewhere established as a matter of state or federal law.

In light of the foregoing, it is clear that the purpose underlying the IAD is not, as the Third Circuit supposed, primarily to further rehabilitation by establishing a substantive right to early adjudication of any unresolved charge, but rather, to provide in the case of a criminal charge detainer, to which a substantive right to a speedy trial otherwise existed, a mechanism to test the substantiality of the criminal charge, with the net result being that the prisoner who was innocent of the charge would not be precluded, by reason of a detainer, from participating in the full range of rehabilitative programs available at his place of incarceration. This being the purpose underlying the IAD, it necessarily follows that the scope of Article III is limited to detainers based upon an unresolved criminal charge.

Furthermore, when the IAD is viewed in its historical context, the meaning of the language of the statute itself is plainly evident. The scope of Article III is delineated by

the following language: "whenever there is pending in any other party State any *untried indictment, information or complaint* on the basis of which a detainer has been lodged . . . he shall be brought *to trial* within 180 days. . . ." *N.J.S.A.* 2A:159A-3(a) (emphasis added). The terms "untried indictment, information or complaint" are not normally thought of as generic terms. They are technical terms which refer to a criminal charge. A complaint, for example, is defined in the Federal Rules of Criminal Procedure as "a written statement of the essential facts constituting the offense charged." *F.R.Crim.P.* 3. An indictment or information consists of a statement of the facts outlined in a complaint but also contains "the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." *F.R.Crim.P.* 7(c). Capital offenses and offenses subject to more than a year's imprisonment must be based upon an indictment. *F.R.Crim. P.* 7(a).

Furthermore, the word "trial" is not customarily used to refer to all manner of adjudications regardless of how informal the proceeding may be. Rather, a trial, especially a criminal trial, is a formal proceeding at which all the rules of evidence apply and at which the accused is afforded the full panoply of due process rights. A probation or parole revocation hearing, however, is by definition an informal proceeding, with limited due process rights. *See Morrissey v. Brewer,* 408 *U.S.* 471, 484 (1972) (right to hearing), *Gagnon v. Scarpelli,* 411 *U.S.* 778 (1973) (limited right to counsel). It is highly unlikely, therefore, that the draftsmen of the IAD would have chosen terms like "indictment," "information," "complaint" or

"trial" to define the scope of Article III if they intended the IAD to encompass all detainers regardless of the basis upon which they were filed. Rather, as the historic context of the act makes clear, these terms were chosen deliberately to indicate that the scope of Article III was limited to criminal charge detainers.

In addition, if it was intended that parole violation detainers were to be included within the scope of the IAD, the draftsmen would have devised some other notification mechanism to trigger the rights provided in Article III. Under the terms of the IAD, the provisions of Article III are triggered when the inmate sends written notification to the court and to the prosecutor *N.J.S.A.* 2A:159A-3(a). If the scope of the Agreement is limited to criminal charge detainers, this notification mechanism is efficacious because notice is directed to the officials likely to be familiar with the charge and who may have even been responsible for filing the detainer. If the scope of the IAD is intended to include parole violation detainers, however, the notification mechanism in Article III is wholly ineffective because judges and prosecutors do not normally handle parole revocation proceedings. *See, e.g., Morrissey v. Brewer,* 408 *U.S.* 471 (1972). *See also N.J.S.A.* 30:4-123.63(d) (if proof of parole violation is established, State Parole Board is to determine whether revocation is desirable). Surely, if it was intended that parole violation detainers be included within the scope of Article III of the IAD a more efficacious notice mechanism would have been devised.[9]

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[9] The Third Circuit recognized this problem as applied to parole violation detainers, but declined to address it in the context of the case before it. *Nash v. Jeffes, supra,* 739 *F.*2d at 883-84 n.11 (P. App. at 13-14 n.11).

The Third Circuit's decision was not based upon consideration of the available extrinsic evidence as much as it was based on the court's view that early adjudication of a detainer based upon probation violation charge was a salutary policy goal which promoted the rehabilitation of a prisoner. *Nash v. Jeffes, supra,* 739 *F.*2d at 881-84 (P. App. 8 to P. App. 14). *See also id.* at 882 n.7 and 883 n.9 (P. App. 9 at n.7 and P. App. 13 at n.9). The court's policy analysis, however, is flawed.

The fundamental assumption underlying the court's analysis is that a prisoner subject to a detainer based upon a charge of probation violation can reasonably expect to have the pending probation violation charge resolved in his favor. *See id.* at 883 (P. App. 12). The Third Circuit believed the prisoner, therefore, should be able to invoke Article III and compel an early adjudication of his probation violation charges because, if and when the charge was resolved in the prisoner's favor, the detainer against him would be dissolved and he would then be able to participate fully in the rehabilitation programs offered by the state in which he was incarcerated. *Id.* (P. App.12).

It is highly unlikely, however, that early adjudication of a probation violation charge lodged because the prisoner committed a crime while on probation will result in a dismissal of the charge. The issue of factual guilt of the violation is conclusively established when one commits a new crime while on parole or probation. *See Morrissey v. Brewer, supra,* 408 *U.S.* 471, 490 (issue of factual guilt of new crime committed while on parole cannot be relitigated at a parole revocation hearing). *See*

also State v. Serio, supra 168 *N.J. Super.* 394, 396 (issue of factual guilt of new crime committed while on probation cannot be relitigated at a probation revocation hearing.) Given this legal standard, it is often, as the Court recognized in *Moody v. Daggett, supra,* 429 *U.S.* 78, in the prisoner's interest to delay a parole or probation revocation hearing for as long as possible, because in the interim the prisoner may establish circumstances, such as a good institutional record or parole plan, which might rebut the presumption of revocation.[10] *Moody v. Daggett, supra,* 429 *U.S.* 78, 89. In view of this, the assumption underlying the Third Circuit's policy analysis, that a prisoner subject to a probation violation detainer can reasonably expect the charge to be resolved in his favor, has no realistic basis. In practice, as the Court has noted, early adjudication of a parole or probation violation charge *increases* the probability that a decision to revoke will be made. *Moody v. Daggett, supra,* 429 *U.S.* at 89 ("forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions . . . a decision to revoke parole would often be foreordained."). Thus, such a prisoner would not realize any measurable rehabilitative benefit if Article III of the IAD were applicable to probation or parole violation detainers, pre-

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[10] Under New Jersey parole law, parole must be revoked whenever a parolee commits a new crime while on parole, unless the parole can establish mitigating circumstances, unrelated to the commission of the offense, which would militate against a revocation decision. *N.J.S.A.* 30:4-123.60(c), *See also Morrissey, supra,* 408 *U.S.* at 490. In the case of probation, the sentencing judge has greater discretion in determining whether a violation should result in revocation of probation. *N.J.S.A.* 2C:45-3.

cisely because early adjudication of the pending charge would tend to assure that a revocation decision will be made. Hence, the prisoner would continue to be subject to a detainer while serving the intervening sentence.[11]

The Third Circuit recognized that when a prisoner commits a new crime while on probation a virtually conclusive presumption that probation will be revoked is triggered. *Id.* at 883 & n.7 (P. App. 9 & n.7). The court acknowledged that in such a case the interest of the prisoner in seeking an early adjudication of the pending probation violation charge would not be sufficiently compelling to outweigh the administrative burden and expense to the state in conducting the revocation hearing prior to completion of the out-of-state sentence. *Id.* at 882 (P. App. 9 & n.7). *See also id.* at 883 (P. App. 13 n.10) ("requiring adjudication before the out-of-state sentence has been served increases the cost because it requires

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[11] It might be suggested that a prisoner might benefit by an early revocation hearing even if his parole is revoked because the violation term might run concurrently to the new, out-of-state sentence. In New Jersey, however, parole violation terms are presumed to run consecutively to any sentence imposed for a crime committed while on parole. *N.J.S.A.* 2C:44-5(c) (amended eff. January 12, 1984); *N.J.S.A.* 30:4-123.27 (repealed eff. April 20, 1980). (No presumption is operative in the case of probation violation; the issue is a matter of judicial discretion. *N.J.S.A.* 2C:44-5(a)). The Parole Board, moreover, has no power to order that the violation term run concurrently to a sentence imposed for a crime committed while on parole; such power is exclusively vested in a judge of the New Jersey Superior Court. *Id.* In any event, even if the violation term were concurrent, a detainer would be lodged for the duration of service of the violation term, to indicate the state's wanting-interest during the period of service of the term.

an additional trip.")[12] However, the court felt that in a "significant number" of cases, the probation violation charge lodged against the prisoner incarcerated out of state would not be based on the new conviction at all, but would be based upon technical, noncriminal violations of the prisoner's probation agreement. *Id.* at 882 n.7 (P. App. 9 n.7). The court concluded, accordingly, that since the adjudication of a technical probation violation charge may require live testimony and that since a prisoner who is incarcerated out-of-state may be compromised by the delay in the adjudication of the charge, "concern for a fair adjudication, as well as concern for constitutional rights should inform our interpretation of the IAD" *Id.* (P. App. 10 n.7).[13] Nothing in the record before the Third Circuit, however, provided any support for the view that a significant number of probation violation detainers lodged against prisoners serving new sentences are based solely on technical, noncriminal charges and the factual circumstances which would give rise to such a scenario do not readily come to mind, at least under New Jersey law.

The Third Circuit's ruling leads to a paradoxical result that surely no legislature ever intended. A prisoner subject to a criminal charge detainer does not receive any new substantive rights from the act; he only is given a mechanism to enforce the substantive right he already

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[12] See J.A. 6 at ¶ 8 for an estimate of the costs incurred in transporting a prisoner interstate.

[13] The Third Circuit had previously ruled that a prisoner serving a sentence in another jurisdiction has no due process right to an immediate parole revocation hearing. *U.S. ex rel. Caruso v. U.S. Bd. of Parole, supra,* 570 F.2d 1150.

has, the right to a speedy trial. *See Smith v. Hooey, supra,* 393 *U.S.* 374; *Klopfer v. North Carolina, supra,* 386 *U.S.* 213. But by making Article III applicable to a probation violation detainer, the Third Circuit has ruled in effect that the IAD creates for a prisoner subject to such a detainer a substantive "speedy trial" right to early adjudication of the probation violation charge, even though he otherwise has no such substantive right. *See Moody v. Daggett, supra,* 429 *U.S.* 78; *U.S. ex rel Caruso v. U.S. Board of Parole, supra,* 570 *F.*2d 1150; *Youth Correct. Institu. v. Smalls, supra,* 172 *N.J. Super.* 1. It is certainly anomalous to conclude that by virtue of the single phrase "untried indictment, information or complaint" a legislature intended to create a substantive right to early adjudication of a charge for a prisoner subject to a probation or parole detainer while it only intended to enforce the pre-existing substantive right to a speedy trial for the prisoner subject to a criminal charge detainer. Further, it is anomalous to conclude that any legislature intended to require the expense of returning temporarily to the jurisdiction a prisoner subject to a parole or probation violation detainer for the purpose of conducting an early revocation hearing when the issue of factual guilt is already conclusively resolved and the probability that the prisoner's parole or probation will be revoked is increased precisely because an early revocation hearing is being conducted.

It may be contended that since, from a rehabilitative standpoint, the impact of a detainer upon a prisoner is the same regardless of the nature of the charge upon which the detainer is based, the scope of Article III of the IAD should therefore include all detainers based upon an unre-

solved charge. If the goal sought to be achieved by means of the IAD was to enable all prisoners subject to detainers to participate fully in rehabilitative programs, however, surely this goal could have been accomplished directly simply by enacting an interstate agreement which provided that no prisoner subject to a detainer would be foreclosed by virtue thereof from participating in any rehabilitative programs. Such legislation would have been tantamount to an elimination of the prison policy that an inmate subject to a detainer poses an escape risk. This policy is surely a reasonable one, however, particularly when an inmate serving a relatively short sentence in one jurisdiction is charged by an out-of-state jurisdiction with a serious crime which carries with it a heavy penalty. Therefore, since the practice of restricting the custodial status of a prisoner against whom any kind of detainer is lodged is justified from a corrections standpoint, it cannot be supposed that the intended function of the IAD is to eliminate the disparity between the treatment of prisoners subject to a detainer and those who are not.

It might also be contended that the scope of Article III of the IAD should include all detainers based upon an unresolved charge because in every case the prisoner experiences some uncertainty about his future. This is unquestionably the case for a prisoner subject to a criminal charge detainer as the very question of factual guilt or innocence of the charge is unresolved. In addition, the question of disposition of sentence, if convicted, is also unresolved.

The prisoner subject to a detainer based upon a charge of probation violation on parole violation, however, does not experience anything near the same degree of uncertainty, either with respect to the issue of his guilt of the violation or with respect to the issue of the ultimate deposition of the violation charge. The issue of factual guilt of the violation is already conclusively established. *See e.g., Morrissey v. Brewer, supra,* 408 *U.S.* at 490. He also knows that his probation or parole will be revoked unless he can establish sufficient mitigating circumstances, unrelated to the commission of the new crime, which might justify a decision not to revoke. *Id.* Since a parolee or probationer has already been sentenced, moreover, he also knows the maximum extent of his sentence obligation to the charging state. The only open question is the length of the violation term which might be imposed.

With respect to probation revocation, under New Jersey law the sentencing judge exercises great discretion in setting the length of the violation term. *N.J.S.A.* 2C:45-3; *N.J.S.A.* 2A:168-4 (repealed eff. Sept. 1, 1979). The judge also has discretion in determining whether the violation term is to be served consecutively or concurrently to the new sentence. *N.J.S.A.* 2C:44-5(a).

With respect to parole, with the exception of the period from September 1979 to January 1984, parole violation terms were always required to be served consecutively to the intervening sentence. *N.J.S.A.* 30:4-123.27 *repealed* eff Sept. 1, 1979 by *N.J.S.A.* 2C:44-5(c) (parole violation term presumed to run concurrently unless otherwise provided by the sentencing judge) *amended* eff. Jan. 12, 1984 (parole violation term presumed to run consecutively). In addition, prior to April 1980, New Jersey parole law required a prisoner whose parole was revoked to serve the balance of his sentence as a viola-

tion term computed from the date of parole release. *N.J.S.A.* 30:4-123.24 (repealed eff. Apr. 20, 1980). After 1980, parole violation terms were established pursuant to a schedule set forth in regulation. *N.J.S.A.* 30:4-123.56(a) (eff. April 20, 1980). *See also N.J. Admin. Code* 10A:71-7.16. As can be seen, under New Jersey law the length of the violation term is predictable to some degree, especially with respect to a parole violation term. Accordingly, neither a prisoner subject to a probation violation charge nor a prisoner subject to a parole violation charge experiences anything like the uncertainty about his future which is experienced by the prisoner subject to a new criminal charge. It is unlikely, therefore, that any legislative body intended that IAD apply to them.

Justice Reed noted that statutory interpretation is exclusively a judicial function, vesting in one branch of government, the judiciary, the duty to construe the meaning of an enactment of another branch, the legislature. *U.S. v. American Trucking Assoc., supra,* 310 *U.S.* at 544. Justice Reed sounded a word of caution, however: "[o]bviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body." *Id.* The Third Circuit has fallen prey to the danger inherent in engaging in statutory construction. As the foregoing makes clear, the court has not construed the IAD in a manner which effectuates legislative intent. Rather the court has ignored that intent and imposed its own policy view instead. Its decision should be reversed.

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CONCLUSION

For all the foregoing reasons, this petitioner, the State of New Jersey, Department of Corrections, submits that the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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Nos. 84-835 and 84-776

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,
Petitioner
v.
RICHARD NASH,
Respondent

PHILIP CARCHMAN,
Petitioner
v.
RICHARD NASH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING SUPPORTING REVERSAL

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QUESTION PRESENTED FOR REVIEW

WHETHER ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS APPLIES TO A DETAINER BASED UPON A CHARGE OF VIOLATION OF A PROBATIONARY SENTENCE, WHICH SENTENCE WAS ENTERED AFTER CONVICTION, BY INTERPRETING THE PHRASE "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" TO ENCOMPASS SUCH A DETAINER?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-835
STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Petitioner

Against

RICHARD NASH,

Respondent

and No. 84-776

PHILIP CARCHMAN,

Petitioner

Against

RICHARD NASH,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING

SUPPORTING REVERSAL

INTEREST OF AMICI STATES

This case presents the question of whether a prisoner's right to speedy disposition of certain detainers guaranteed by the Interstate Agreement on Detainers (Agreement) extends to a detainer based on a charge of violation of a probationary sentence.[1] Article III(a) of the Agreement obligates a prosecutor to arrange the return an out-of-state prisoner for trial within 180 days of the prisoner's delivery of a written request for final disposition of "any untried indictment, information or complaint." (18 U.S.C. App. (1976)).

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[1]previously in an action brought pursuant to the Civil Rights Act, 42 U.S.C. §§1981, 1983 (1976) the Court has found that the Agreement is a uniform compact approved by Congress and as such its construction presents a federal question. Cuyler v. Adams, 449 U.S. 433, 438 (1981).

Article V(c) provides that failure to accept temporary custody or failure to bring the prisoner to trial within the time provided obligates the court in which the charges are pending to dismiss the untried charges with prejudice and to order that any detainer based on the charges have no effect.

The Court of Appeals held that the Agreement was applicable to a detainer based on a charge of violation of a probationary sentence where the probationary sentence was imposed after conviction.[2] Based on this interpretation, the Court of Appeals affirmed the district court's order granting a

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[2]In the instant case Nash, pursuant to a plea bargain, pled guilty to the crimes of breaking and entering with intent to rape and assault with intent to rape. He received a sentence of 36 months, 24 months suspended with two years probation. Pet. App 77, 78, 102.

writ of habeas corpus.[3] Amici States, all signatories to the Agreement, submit that the Third Circuit's opinion creates a new and substantial administrative and fiscal burden on their limited personnel

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[3]This Court, while finding the Agreement presented a federal question under 42 U.S.C. §§1981, 1983 (1983), Adams, supra., has never addressed whether the Agreement presents a federal question when the jurisdiction of the federal courts is being invoked pursuant to the Habeas Corpus statutes, 28 U.S.C. §§ 2241, 2254, 2255, (1976)). While the various courts of appeals which have addressed the availability of federal collateral review for violations of the Agreement post-Adams are in accord that the Agreement is one of the "laws...of the United States" contemplated by 28 U.S.C. §§2241, there is a split of opinion as to whether failure to provide the process set forth in the Agreement is an "error of law [and is] 'a fundamental defect which inherently results in a complete miscarriage of justice'", Davis v. United States, 417 U.S. 333, 346 (1974). Compare: Cavallaro v. Wyrick, 701 F.2d 1273, 1275 (8th Cir.) cert. denied, ___ U.S. ___, 51 L.W. 3902

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and financial resources without providing the salutory effect perceived to exist by the Court of Appeals and that the decision of the Third Circuit runs counter to the plain meaning of the language of the statute and to the available legislative

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FOOTNOTE CONTINUED

(June 20, 1983); Johnson v. Williams, 666 F.2d 842, 844 n. 1 (3d Cir. 1981); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980), Bush v. Muncy, 659 F.2d 402, 409 (4th Cir. 1981), cert denied, 455 U.S. 910 (1982); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977); Fasano v. Hall, 615 F.2d 555, 558 (1st Cir.) cert. denied, 449 U.S. 867 (1980), Neville v. Cavanagh, 611 F.2d 673, 676 (7th Cir. 1979) (dictum) cert. denied 446 U.S. 908 (1980), Rivera v. Harris, 643 F.2d 86, 90 n. 2 (2nd Cir.) rev'd on other grounds, 454 U.S. 339 (1981); and United States v. Williams, 615 F.2d 585, 590 (3d Cir. 1980).

history.[4] Accordingly, amici have a substantial interest in the outcome of this case.

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[4]No exact tally of the number of prisoners confined under sentence in one signatory state with detainers lodged by another signatory state for violation of either a probationary sentence or the conditions of parole was available as none of the states routinely tabulates such information. However, the National Crimes Information Center of the United States Department of Justice informs us that as of February 5, 1985, 15,598 persons were listed as being sought by the 48 signatory states and the District of Columbia for violation of parole and 27,177 persons were listed as being sought by the same jurisdictions for violation of probationary sentences. Amici believe a significant number of this total will ultimately be located through arrest for new crimes committed in another signatory jurisdiction and those new charges will result in conviction and sentencing.

Summary of Argument

It was the unfulfilled responsibility of the court below to construe the Agreement consistent with the plain meaning of the statute aided by whatever clearly expressed legislative intent was found to exist. To the contrary, the Third Circuit assumed a policy making role and in so doing oversimplified the nature of the policy interests at stake.

Amici submit that the language of the statute, the available legislative history and its purpose read in conjunction do not reveal a clearly expressed intent contrary to the traditional definitions of "untried indictment, information or complaint". There is no constitutional obligation to quickly resolve these detainers. For such an obligation to exist the States must be found to have freely and knowingly agreed to it. The conclusion of each State court which has ruled on the issue that detainers for

violations of a probationary sentence are outside the scope of the Agreement rebuts any assumption to the contrary. The interpretation by the courts below that the scope of the Agreement is controlled by a general definition of the word detainers renders the critical limiting phrase surplusage. Such an interpretation is contrary to the rules for proper statutory construction.

Lastly, the Court of Appeals failed to weigh all policy considerations and premised its analysis on misassumptions of fact. Given the predictive nature of the hearing, amici believe that an early resolution of the detainer when the violator has had no time to exhibit reformed behavior will militate both in favor of revocation and the longest sentence permitted. To force such action serves neither the interests of society nor the prisoner.

ARGUMENT

A DETAINER FOR A CHARGE OF VIOLATION OF A PROBATIONARY SENTENCE IS NOT A DETAINER FOR AN "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" AND THE AGREEMENT ON DETAINERS IS NOT APPLICABLE TO SUCH A DETAINER.

In its decision in this case the Third Circuit has abandoned its role as interpreter of statutes in favor of the policy-making role usually thought to reside in the legislatures of the States and Congress. The Court, frankly and with little hesitation, rejected the "technical" construction of the Agreement arrived at by the Ninth Circuit and each of the state courts which have addressed the question.[5] In so doing, the Court

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[5]Four state courts of last resort have determined that the Agreement is inapplicable to a detainer for violation of a probationary sentence: Clipper v. Maryland, 295 Md. 303, 455 A.2d 973 (1983); Padilla v. Arkansas, 279 Ark. 100, 648 S.W.2d 797 (1983); State v.

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of Appeals not only overstepped the proper bounds of its function in resolving disputes - it also oversimplified the nature of the policy interests at stake. Because the decision below failed to properly heed the limits of the precise statutory language under review, it must be reversed.

Amici submit that, in determining the intended scope of the Agreement the Court of Appeals should have looked first

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FOOTNOTE CONTINUED

Knowles, 275 S.C. 312, 270 S.E. 2d 133 (1980), and Suggs v. Hopper, 234 Ga. 242, 215 S.E. 2d 246 (1975). In addition, three state intermediate courts have held likewise: People ex rel. Capalongo v. Howard, 87 App. Div. 2d 242, 453 N.Y.S. 2d 45 (N.Y. App. Div. 1982); People v. Jackson, 626 P.2d 723 (Colo. App. 1981); and Blackwell v. State, 546 S.W. 2d 828 (Tenn. Crim. App. 1976).

at its language.[6] Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1985). "[W]hen aid to construction of the meaning of words, as used in statute, is available there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'".

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[6]The relevant portion of Article III of the Agreement provides:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint....

18 U.S.C. App. (1976).

Cass v. United States, 417 U.S. 72, 78-79 (1974) quoting United States v. American Trucking Assns., Inc., 310 U.S. 534, 543-544, reh. denied, 311 U.S. 724 (1940). But "[i]f the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is 'a clearly expressed legislative intent to the contrary.' [United States v. Turkette, 452 U.S. 576, 580 (1981)], quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)" Dickerson 460 U.S., at 110. The task before the Court of Appeals was "to interpret the words of [the statute] in light of the purposes [the State legislatures and] Congress sought to serve." Ibid, quoting Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

Here the Court of Appeals appears to have concluded implicitly that the

language of the Agreement, when compared with the purposes of the Agreement and the scant available history, rendered the language sufficiently ambiguous to reject the traditional, or as termed by the circuit court "technical", meaning of the phrase "untried indictment, information, or complaint" found throughout the Agreement in favor of an expanded definition to include charges of violation of probationary sentences.[7] The language of the statute, its legislative history and its purpose read in conjunction do not reveal a clearly expressed

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[7]The commentary relied upon was published in 1956 by the Council of State Governments and included in their publication of "Suggested State Legislative Program for 1957", pp 74-76 (1956). United States v. Mauro, 436 U.S. 340, 359 (1978). It should be noted that the type of probation involved is important to the position of amici. Their position does not relate to periods of probation imposed without verdict as part of a

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legislative intent contrary to the traditional definition found appropriate by the Court of Appeals for the Ninth Circuit in United States v. Roach, 745 F.2d 1252 (9th Cir. 1984)(probation detainer) and Hopper v. United States Parole Commission, 702 F.2d 842 (9th Cir. 1983) (parole violation).

Article I of the Agreement states the purpose of its enactment: "[I]t is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition

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FOOTNOTE CONTINUED

prosecution diversion program. In such situations the accused foregoes his right to a speedy trial in consideration for the prosecutor's promise to nolle pros the charges after the accused has satisfactorily completed a period of supervision. If the accused violates the terms of such supervision the prosecutor reinstates the untried charge and the matter proceeds as if the hiatus had not occurred.

of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." (18 U.S.C. App.) But whatever may be the breadth of the term "charges", Article III imposes obligations on the signatory parties only with respect to an "untried indictment, information or complaint." What these terms have in common is that they denote the initiation of criminal proceedings. Of course, proceedings connected with probation, including those in which alleged violations of probationary conditions are reviewed, are but a continuation of the process which began with an untried criminal accusation and resulted in a probationary sentence after conviction. It takes a rather imaginative leap in reasoning to conclude that the terms indictment, information or complaint were intended by the signatories to refer

to a state's claim that a prisoner has violated the conditions for release from a sentence imposed after trial on an indictment, information or complaint.

The Court of Appeals, by expanding the scope of Articles III and V of the Agreement to include detainers for violation of probationary sentences, has created a substantial obligation on the States. Since there is no constitutional obligation on the States to move speedily to revoke probation, Moody v. Daggett, 429 U.S. 78 (1976),[8] the States' obligations are those knowingly accepted by the States in signing the

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[8]The Third Circuit has considered and rejected the argument that a different conclusion is warranted in the situation in which two different and autonomous parole authorities are involved. United States ex rel Caruso v. United States Board of Parole, 570 F.2d 1150, 1155 (3d Cir.), cert. denied, 436 U.S. 911 (1978).

Agreement. As such, the Agreement is a contract and the question is what terms each State voluntarily and knowingly accepted to enter the Agreement.[9] As observed by this Court in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981): "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." The States' obligations must be "unambiguous" Ibid. In this regard, it is highly illuminating in answering the question of to what did the States agree that no State court has held that the Agreement includes within its scope detainers for violation of probationary

[9]Indeed, the preample of the Agreement concludes: "The contracting states solemnly agree that...." (18 U.S.C. App. (1976))."....

sentences.[10]

The available legislative history supports our position. The legislative history from the Congress, created when the United States adopted the Agreement, explains that "[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." H.Rep.No. 91-1018, p. 2 (1970); S. Rep. No. 91-1356, p. 2 (1970), reprinted in 1970 United States Code, Congressional and Administrative News 4864. Of course, allegations that the conditions of probation have been violated are not criminal charges. That same legislative history notes further that "the enactment of this legislation would

[10]See: Note 5, supra.

afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." Ibid. This legislative history, which does not mention detainers for charges of violation of probationary sentences, reveals a concern which only could relate to new criminal charges; there is no constitutional "speedy trial right" to disposition of such violation detainers. See, e.g., Moody, supra.[11]

The commentary relied upon by the district court and the Court of Appeals (Pet. App. 10, 28) in turn merely suggests in general terms the

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[11] In Moody the Court did not have before it the question of whether the potential of adverse actions by two different and antonomous parole authorities warranted a different conclusion and expressly reserved determination of this question. 429 U.S., at 88.

various possible sources of detainers and is not an attempt to define precisely the scope of the Agreement. If indeed the Agreement was to encompass every conceivable type of detainer, the inevitable conclusion is that the qualifying phrase "any untried indictment, information, or complaint" is surplusage. An interpretation which renders a portion of a statute plainly redundant should be avoided. Bell v. New Jersey, 461 U.S. 773, 788-789 (1983). Therefore, amici submit that neither the language of the Agreement nor the available legislative history supports the conclusion that probation parole violation detainers are within its scope.[12]

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[12] One State, Kentucky, has amended the language of the Agreement to specifically include detainers for violations of probation and parole. Kentucky

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Furthermore, the Court of Appeals failed to consider all of the relevant policy considerations when it concluded

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FOOTNOTE CONTINUED

Revised Statutes, Section 440.455 Enact. Acts 1976, Ch. 211 §1. That amendment provides:

> Interstate agreement to apply to detainers based on affidavits and warrants charging violation or probation and parole--Commonwealth of Kentucky is a party to the interstate agreement on detainers and shall be deemed to have contracted with each state joining therein an amendment to said interstate agreement in the form substantially as follows:
>
> Amendment to the interstate agreement on detainers concerning detainers based on violations of the terms of probation and parole (1) This amendment shall provide additional remedies, and shall be binding only as among and between those party states which specifically execute the same. (2) All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or resolved affidavits and warrants charging violations of the terms of probation and parole.

As no other State has enacted such an amendment, its provisions have never become effective.

that an early hearing on a parole violation charge necessarily benefits the prisoner. To the contrary it can be assumed safely that a probationer who has been convicted of an offense resulting in new incarceration will have his probation revoked.[13] There is no reason to believe that replacing a detainer for potential violation with a detainer for a found violation will benefit the prisoner during his current imprisonment. The sentence imposed frequently will be for a range of time rather than a specific determinate time period so that certainty as to the specific date of release is not materially advanced. It is also likely that given the unknowns of possible future future good behavior

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[13]The new conviction alone is conclusive on the question of whether a violation has occurred. Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

by the violator and the fact that the most recent factor to be considered is the new conviction, the period imposed will be the longest sentence permitted. As explained in Moody, in the context of a parole revocation hearing:

> Finally, there is a practical aspect to consider, for in cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation. This is uniquely a "prediction as to the ability of the individual to live in society without committing antisocial acts." In making this prophecy, a parolee's institutional record can be perhaps one of the most significant factors. Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions...a decision to revoke parole would often be foreordained. Given the predictive nature of the hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate--at the expiration of the parolee's intervening sentence.

429 U.S., at 89.

The statutory construction which the Court of Appeals candidly admits is an "analysis of the legislative history ...based on policy...," Pet. App. 13, n. 9, is neither interpretation of the statutory language as controlled by a clearly expressed legislative intent nor a proper historical analysis of the problem sought to be remedied by the Agreement. To "expand[] the scope", Ibid., of the Agreement is a legislative function not a judicial one and the Court of Appeals lacked the authority to do so. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 31 (1973).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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MERCER COUNTY PROSECUTOR,
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On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that Article III of the Interstate Agreement on Detainers, as evidenced by the language of the Agreement and its explicit legislative history, applies to detainers based upon probation violation complaints?

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STATEMENT OF THE CASE

On June 21, 1978, the Mercer County Probation Department of the State of New Jersey filed a detainer against the respondent Richard Nash who was then incarcerated in Pennsylvania upon various charges. The detainer charged that the respondent had violated the conditions of his probation by having been charged with a crime in Pennsylvania while on probation from New Jersey. After respondent began service of his Pennsylvania sentence, he perfected his request for a final disposition of the detainer under the Interstate Agreement on Detainers (hereinafter Agreement). *N.J. Stat. Ann.* § 2A:159A-1 *et. seq.* (West 1971)[1] While acknowledging the applicability of the Agreement to respondent's probation violation complaint, the Mercer County Prosecutor failed to return respondent to New Jersey for a final disposition of the detainer within the statutorily prescribed time period.[2]

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[1] The Detainer Agreement is reproduced in the Appendix at App. 110-124 filed simultaneously and bound with the Petition for Certiorari submitted by petitioner, Philip S. Carchman and incorporated by reference in the Joint Appendix. References to "App." are to pages of this Appendix.

[2] At the time the detainer was filed against the respondent, he was arrested and imprisoned in Pennsylvania pending trial. He was tried and convicted on the Pennsylvania charges on March 14, 1979, and sentenced on July 13, 1979. During the period from February, 1979 until November 5, 1979, the respondent sent one or more letters to officials in Mercer County, including New Jersey Judge A. Jerome Moore, Mercer County Prosecutor Anne Thompson, Mercer County Probation Officer Judy Giordano, Chief Mercer County Probation Officer Holloway and Mercer County Assignment Judge George Y. Schoch, requesting final disposition of the detainer. On December 6, 1979 the respondent executed Form II under the Interstate Agreement on Detainers formally requesting transfer to Mercer County to resolve the probation violation charge. Although his letters made no

Accordingly, on March 6, 1980, the respondent, pursuant to 28 U.S.C. § 2254 (1976), filed a petition for a writ of *habeas corpus* in the United States District Court for the Middle District of Pennsylvania seeking dismissal of the detainer in accordance with his rights under Article III(d) of the Agreement. (App. 97-100) On February 3, 1981, the District Court for the Middle District of Pennsylvania, for jurisdictional reasons, transferred the case to the United States District Court for the District of New Jersey and entered an order to that effect. (App. 101). On July 24, 1981, the Honorable Dickinson R. Debevoise, U.S.D.J., entered an order staying respondent's federal action until exhaustion of state court remedies within New Jersey. (App. 81).

On August 24 and 25, 1981, the New Jersey trial court held a hearing on respondent's motion to dismiss the probation violation detainer. Assuming that the Detainer Agreement was applicable to probation violation detainers, and never addressing the issue, the court denied respondent's motion on the ground that he had not substantially complied with the statutory notice requirements. (App. 51-75) In addition, the court ruled respondent's Pennsylvania convictions constituted a violation of probation and resentenced him to consecutive 18 month sentences to be served at the Mercer County Detention Center consecutive to service of his Pennsylvania sentence. (App. 80) On June 22, 1981, the Appellate Division of the Superior Court of New Jersey affirmed the judgment of conviction for the reasons relied upon by the lower court (App. 44); on November 12, 1981, the New Jersey Supreme Court denied a petition for certification. (App. 43)

explicit reference to the Agreement, both lower courts found that his communications effectively notified the Mercer County Prosecutor and court of his demand for final disposition of the detainer under the Agreement and that the State of New Jersey failed to fulfill its obligation to provide a resolution of the complaint within 180 days from when he made his request. *Nash* v. *Jeffes*, 739 F. 2d 878, 885 (3d Cir. 1984) (App. 1-18); *Nash* v. *Carchman*, 558 F. Supp. 641, 651 (D.N.J. 1983) (App. 21-42).

On January 4, 1983, Judge Debevoise held a hearing at the United States Court House at Philadelphia to decide the legality of the detainer. The District Court ruled that Article III of the Agreement is applicable to detainers based upon probation violation complaints and that the State of New Jersey had violated the respondent's rights to a prompt hearing under the Agreement by failing to provide a resolution of the detainer within the required statutory time period. *Nash* v. *Carchman*, 558 F. Supp. 641 (D.N.J. 1983) (App. 21-42). On March 21, 1983, Judge Debevoise vacated the respondent's conviction of a violation of probation and ordered his release from state custody. (App. 42-43)

Petitioner Mercer County Prosecutor appealed to the United States Court of Appeals for the Third Circuit. Petitioner Department of Corrections of the State of New Jersey was allowed to intervene on the ground that the District Court's decision invalidated its policy that parole and probation violation detainers do not fall within Article III of the Agreement. (App. 18) In a carefully considered opinion, the Court of Appeals held that, as a matter of statutory construction, Article III(a) of the Detainer Agreement encompasses probation violation detainers within its scope. *Nash* v. *Jeffes*, 739 F. 2d 878 (3d Cir. 1984) (App. 1-18)[3]. This ruling was based on the

[3] A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984 (App. 103). The mandate was filed on September 4, 1984. (App. 105)

language of the Detainer Agreement and the Council of State Government's legislative commentary. The court concluded "[f]airness to the prisoner and proper allocation of society's resources require that detainers be promptly removed unless the prisoner has been finally and constitutionally sentenced to further imprisonment on the basis of the charge underlying the detainer. This is true regardless of whether the detainer is based on an indictment or on a probation violation." *Id.* at 883 (App. 12).

SUMMARY OF ARGUMENT

This case presents the question of whether a probation violation detainer is an "untried complaint" within the meaning of the phrase "untried indictment, information or complaint" as used in Article III of the Interstate Agreement on Detainers. Article III gives a prisoner the right to demand a final disposition of any detainer based upon an "untried indictment, information or complaint" in the foreign jurisdiction from which the detainer emanates. Article I of the Agreement explicitly provides that the act is addressed to all "charges outstanding against a prisoner," and Article IX mandates that the Agreement "shall be liberally construed so as to effectuate its purposes." Principles of statutory construction dictate that these three articles should be construed together. A joint construction of these three articles logically leads to the conclusion that a probation violation detainer is an "untried complaint" within the intendment of the phrase "untried indictment, information or complaint" as used in Article III. Other provisions of the statute compel the same conclusion.

Legislative history contemporaneous with the Agreement provides further strong support for interpreting the Agreement as enhancing prisoner's rights and applying

Article III to detainers based upon probation violation complaints. The major purpose of the Agreement was to benefit prisoners principally by minimizing the disruptive effect upon rehabilitation caused by the policy of allowing detainers to remain unresolved against a prisoner for an indefinite period of time. Because the effects of a probation violation detainer upon prisoners and programs of treatment do not differ from the effects caused by detainers based upon other charges, it is therefore absolutely consistent with the desires of the legislature to construe the Agreement as incorporating probation violation complaints and affording to prisoners the redress provided by Article III.

Furthermore, because the operative provisions of the Agreement can be so readily applied to dispose of detainers based upon probation violations, applying Article III to probation violation detainers would not impose any significant administrative or financial burdens upon the State. Actually, such application would promote the efficient administration of justice and reduce the expenses incurred in the handling of detainers. Even if application of Article III to probation violation detainers were to result in an increase of governmental burdens, any interest the State has in reducing costs is outweighed by the prisoner's interest in rehabilitation.

The Third Circuit Court of Appeals correctly construed that the phrase "untried indictment, information or complaint" as used in Article III includes probation violation detainers within its scope. The decision of the Court achieves the goals enunciated in the policy statement and legislative history of the Agreement and avoids a literal interpretation of the operative phrase that would defeat the statutory scheme.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY HELD THAT A PROBATION VIOLATION COMPLAINT IS INCLUDED WITHIN THE MEANING OF THE PHRASE "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" AS USED WITHIN ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS.

A. The Language Of The Agreement Clearly Indicates That The Drafters Intended The Agreement To Apply To Detainers Based On Probation Violation Complaints.

The Interstate Agreement on Detainers is an interstate compact enacted by forty-eight states, the federal government and the District of Columbia to facilitate interstate resolution of detainers based upon all charges outstanding against prisoners. *Cuyler* v. *Adams*, 449 U.S. 433, 422 (1981).[4] Article III confers upon a prisoner against whom a detainer has been lodged the right to demand that the prosecuting authorities in the receiving state bring him to trial within 180 days of his written request. *N.J. Stat. Ann.* § 2A:159A-3(a). Such a written request constitutes a request for final disposition of all untried charges underlying detainers filed by the receiving state. *N.J. Stat. Ann.* § 2A:159A-3(d). The request is

[4] The final draft of the proposed legislation was circulated by the Council of State Governments in 1957. Council of State Governments, *Suggested State Legislation, Program for 1957*, 80 (1956). The New Jersey Interstate Agreement on Detainers was enacted verbatim shortly thereafter in 1959. *N.J. Stat. Ann.* § 2A:159A-1 *et seq.* In 1970, after the Agreement had been enacted by 28 states, the federal government and the District of Columbia adopted the Agreement in substantially the same form. 18 U.S.C. App. § 2 (1976); Note, *The Interrelationship Between Habeas Corpus Ad Prosequendum, The Interstate Agreement on Detainers and The Speedy Trial Act of 1974: United States* v. *Mauro*, 40 Univ. Pitt. L. Rev. 285, n.3 (1978).

also deemed to waive any extradition proceedings as to all untried charges and as to any sentence that is thereafter imposed on the prisoner in the receiving state which must be served following completion of his sentence in the sending state. *N.J. Stat. Ann.* § 2A:159A-3(c). Failure of the authorities to commence trial within the 180-day period, unless excused for good cause, results in the dismissal of all untried charges. *N.J. Stat. Ann.* § 2A:159A-3(a) and 5(c)[5] When Article III is read in conjunction with Articles I and IX, and other provisions of

[5] In this case, the Third Circuit affirmed the district court's grant of a writ of *habeas corpus* to respondent Nash because the State of New Jersey failed to provide a hearing on the probation violation charge within 180 days of his request for disposition as set forth in Article III of the Detainer Agreement.

Since this Court's decision in *Cuyler* v. *Adams*, 449 U.S. 433 (1981), which established that the Agreement presents a federal question under 42 U.S.C. § 1983 (1981), the Courts of Appeals have held that the Agreement is a federal law for purposes of the *habeas corpus* statutes. 28 U.S.C. §§ 2241, 2254 and 2255 (1976). However, the courts are not in accord as to whether every violation of the Agreement will entitle a prisoner to relief in a *habeas* proceeding. Four circuits, the Third Circuit among them, relying on *United States* v. *Mauro*, 436 U.S. 340, 364-65 (1978) which established that a governmental violation of the Agreement is an absolute defense to an outstanding charge, have held that in view of the central policy of the Agreement and the sanction of mandatory dismissal, a prisoner who shows a violation of the time provisions of the Agreement presents an "exceptional circumstance" that requires *habeas* relief. *Brown* v. *Wolff*, 706 F. 2d 902 (9th Cir. 1983); *Cavallaro* v. *Wyrick*, 701 F. 2d 1273, 1275 (8th Cir.), *cert.* denied, ___ U.S. ___, 103 S. Ct. 3120 (1983); *Johnson* v. *Williams*, 666 F. 2d 842, 844 n.1 (3d Cir. 1981); *United States* v. *Williams*, 615 F. 2d 585, 590 (3d Cir. 1980); *Cody* v. *Morris*, 623 F. 2d 101, 103 (9th Cir. 1980); *Neville* v. *Cavanaugh*, 611 F. 2d 673, 676 (7th Cir. 1979) (dictum), *cert.* denied, 446 U.S. 908 (1980). Other circuits, injecting a harmless error standard into the Agreement, demand more than a failure to comply with the statutori-

the Agreement, it is clear that the phrase "untried indictment, information or complaint" encompasses a probation violation complaint. *N.J. Stat. Ann.* § 2A:159A-1,3,4,5 and 9.[6]

Although the starting point in every case of statutory construction is the language used by the legislature, the terms of a statute must be interpreted to effectuate the policies intended to be achieved.

ly prescribed time requirements before relief will be granted. *Bush* v. *Muncy*, 659 F. 2d 402, 408 (4th Cir. 1981), *cert.* denied, 455 U.S. 910 (1982); *Mars* v. *United States*, 615 F. 2d 704, 707 n.9 (6th Cir.), *cert.* denied, 449 U.S. 849 (1980); *Sassoon* v. *Stynchombe*, 654 F. 2d 371, 374 (5th Cir. 1981); *Fasano* v. *Hall*, 615 F. 2d 555, 558 (1st Cir.), *cert.* denied, 449 U.S. 862 (1980); *Edwards* v. *United States*, 564 F. 2d 652, 653 (2d Cir. 1977). Since the Third Circuit takes the position that a showing of a violation is enough to entitle a prisoner to relief, this issue was not presented or argued below.

[6] Because the facts of this case involve a detainer based on a charge of probation violation, the Third Circuit specifically limited its decision to the probation violation context and held only that a "probation violation is a 'complaint' within the meaning of Article III of the IAD." *Nash* v. *Jeffes*, 739 F. 2d at 880. The court noted that the notice to the prosecutor and judge required by Article III might not inform the proper officials in the parole violation context of the prisoner's request for adjudication under a parole violation detainer. *Id.* at 883, n.11. However, the court declined to decide whether a distinction between parole and probation violation detainers is valid or would lead it to a different result. *Id.* Thus, petitioner's contention that it is "unclear" whether the Third Circuit opinion applies to parole violation detainers is without foundation. (Brief for petitioner Mercer County Prosecutor at 10, n.2) Since the issue of whether a parole violation complaint is a complaint within the scope of the Detainer Agreement was not passed on by the court of appeals and is not presented by the facts of this case, it should not be decided here. *United States* v. *Fleischman*, 339 U.S. 349, 365 (1950).

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as is indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature. *Brown* v. *Duchesne*, 19 How. 183, 194 (1857).

Kokoszka v. *Belford*, 417 U.S. 642, 650 (1974). The individual parts of the statute cannot be read in isolation from one another because each part derives its particular meaning from the central concept of the statute. *United States* v. *The Heirs of Boisdoré*, 49 U.S. (8 How.) 112, 121 (1850).

The explicit objective of the Interstate Agreement on Detainers is to resolve charges outstanding against a prisoner because they interfere with the prisoner's ability to participate in rehabilitative programs. *United States* v. *Mauro*, 436 U.S. 340, 347 (1978); *N.J. Stat. Ann.* § 2A:159A-1.[7] Article I, which sets forth the Agreement's purposes, applies the statute to all "charges outstanding against a prisoner" and to "detainers based on untried

[7] Commentators agree that the adverse effects of detainers generally were the motivating force behind the drafting of the Agreement. *See generally*, Leslie W. Abramson, *Criminal Detainers*, 93 (1979); Bennett, *The Last Full Ounce*, 23 Fed. Prob. 20, 22-23 (June 1959); Bennett, *The Correctional Administrator Views Detainers*, 6 Fed. Prob. 8 (July-September 1945); Burkhart, *Interstate Cooperation in Probation and Parole*, 24 Fed. Prob. 24, 27 (June 1960); Dauber, *Reforming the Detainer System: A Case Study*, 7 Crim. L. Bull. 669, 671 (1971); Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753, 754 (1971); Yackle, *Taking Stock of Detainer Statutes*, 8 Loyola L.A. L. Rev. 88, 91-94 (1975); Note, *Convicts-The Right to Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828, 852 (1964); Note, *Detainers and the Correctional Process*, 4 Wash. U.L.Q. 417, 418-423, 429-431 (1966).

indictments, informations or complaints." *N.J. Stat. Ann.* § 2A:159A-1. Since a probation violation complaint is a "charge outstanding against a prisoner," it is a charge encompassed within Article I of the Agreement. When read in conjunction with Article I, it is evident that the phrase "untried indictment, information or complaint" as used in Article III includes within its scope a probation violation complaint.[8]

This conclusion is buttressed further by Article IX which mandates that "[t]his agreement shall be liberally

[8] One federal court, *United States* v. *Roach*, 745 F. 2d 1252 (9th Cir. 1984); four state courts of last resort, *Clipper* v. *Maryland*, 295 Md. 303, 455 A. 2d 973 (1983); *Padilla* v. *Arkansas*, 279 Ark. 100, 648 S.W. 2d 797 (1983); *State* v. *Knowles*, 275 S.C. 312, 270 S.E. 2d 133 (1980); *Suggs* v. *Hopper*, 234 Ga. 242, 215 S.E. 2d 246 (1975); and five state appellate courts, *Irby* v. *State of Missouri*, 427 So. 2d 367 (Fla. Dist. Ct. App. 1983); *People ex rel. Capalongo* v. *Howard*, 87 A.D. 2d 242, 453 N.Y.S. 2d 45 (1982); *People* v. *Jackson*, 626 P. 2d 723 (Colo. Ct. App. 1981); *Blackwell* v. *State*, 546 S.W. 2d 828 (Tenn. Crim. App. 1976); *People* v. *Batalias*, 35 A.D. 2d 740, 316 N.Y.S. 2d 245 (1970), have found that a probation violation complaint is not included within the scope of the Interstate Agreement on Detainers. None of these courts examined the legislative history of the IAD or supported their conclusions with persuasive analysis. One state appellate court, however, has found that such a complaint is within the scope of the Agreement. *Gaddy* v. *Turner*, 376 So. 2d. 1225 (Fla. Dist. Ct. App. 1979), *rev'd*, *Irby* v. *State of Missouri*, *supra*. In this matter, the Court of Appeals for the Third Circuit rested its decision upon the cogent analysis of the district court remarking that:

> Although the authority on the other side is entitled to considerable weight, the strength of the district court's analysis far exceeds that of the opinions reaching the opposite result.

Nash v. *Jeffes*, 739 F. 2d at 881. (1984). Petitioner Mercer County Prosecutor erroneously supports his argument with reference to cases dealing with parole violation detainers. *Hopper* v. *United States Parole Comm'n*, 702 F. 2d 842 (9th Cir. 1983); *Hernandez* v.

construed so as to effectuate its purposes." *N.J. Stat. Ann.* § 2A:159A-9. To give effect to Article IX a probation violation complaint must come within the scope of Article I. Any contrary construction would render the mandate in Articles I and IX meaningless. Such a result could not possibly have been within the contemplation of the legislature which sought to alleviate the adverse effects of all charges outstanding against a prisoner.[9] Con-

United States, 527 F. Supp. 83 (W.D. Okla. 1981); *Sable* v. *Ohio*, 439 F. Supp. 905 (W.D. Okla. 1977); *Cart* v. *DeRobertis*, 117 Ill. App. 3d 587, 453 N.E. 2d 153 (1983); *Maggard* v. *Wainwright*, 411 So. 2d 200 (Fla. Dist. Ct. App. 1982); *Wainwright* v. *Evans*, 403 So. 2d 1123 (Fla. Dist. Ct. App. 1981); *Buchanan* v. *Michigan Dept. of Corrections*, 50 Mich. App. 1, 212 N.W. 2d 745 (1973).

[9] Petitioners urge this Court to follow the doctrine of strict literalism and adopt a narrow, technical interpretation of the terms contained in Article III. (Brief for petitioner Mercer County Prosecutor at 11-13; Brief for petitioner New Jersey Department of Corrections at 22-24.) In advancing this argument, petitioners ignore Articles I and IX and offer no explanation for their inclusion in the Agreement. Under petitioners' statutory construction, Article III supplants Articles I and IX, whereas clearly the legislature intended all operative provisions of the Agreement to be subordinate to the latter. "The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature . . ." C.D. Sands, 2A Sutherland, *Statutes and Statutory Construction* § 46.07 (1984). Likewise, the decision in *United States* v. *Roach*, 745 F. 2d 1252 (9th Cir. 1984) is similarly flawed. There is no discussion of Articles I and IX and a complete disregard of the absurd results that a literal construction produces. (See, n. 12, *infra*.)

Courts regularly reject the doctrine of literalism when it would defeat the purpose of the legislation. Under the Uniform Criminal Extradition Act, a related subject matter area, the courts have held that a person charged with a parole or probation violation is "charged with a crime" and thus, have rejected a literal interpretation of the phrase because it would lead to an unacceptable result. *Salazar* v. *Eads*, 466 F. 2d 765 (7th Cir. 1972); *People* v. *Mallon*, 218 A.D. 461,

sequently, when the Third Circuit Court of Appeals held that the phrase "untried indictment, information or complaint" in Article III was not limited to untried criminal offenses and included probation violation complaints, it was merely giving the statutory language the plain meaning the legislature intended it to have.[10]

Other operative provisions of the Agreement compel the same conclusion. A probation violation complaint is

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218 N.Y.S. 432 (1926); Uniform Criminal Extradition Act, 11 U.L.A. 51 (Supp. 1980). In view of this broad interpretation of the phrase "charged with a crime" to include probation violation charges under the Extradition Act, the position advanced by the *Amici* Attorneys General that they are not criminal charges for purposes of the Agreement is inherently contradictory. (Brief for *Amici* Attorneys General at 18).

[10] One state, Kentucky, has amended its statute to apply to detainers based upon violations of probation and parole. *Ky. Rev. Stat* § 440.455 (1976). The amendment provides in pertinent part:

> All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole.

Ky. Rev. Stat. § 440.455(2) (1976). The amendment, however, does not indicate that a probation violation complaint was not encompassed within the Agreement originally, but rather reflects a declaration of original intent. As one court has observed:

> [The Kentucky Amendment] is simply declaratory of the intent and effect of the language of the uniform law . . . which encompasses detainers based on complaints generally as well as indictment or information.

Maggard v. *Wainwright*, 411 So. 2d at 203 (Wentworth, J., dissenting). That this is so is made evident by the fact that the notification procedures in Article III were not changed. Obviously the Kentucky legislature felt that the original language of the operative provisions of the Agreement applied both to probation and parole violation complaints. Because the language of the statute is sufficiently definitive of the scope of Article III legislative amendment is not needed.

also encompassed within the meaning of the phrase "untried indictment, information or complaint" as it is used in Articles III(c), III(e) and V(d). *N.J. Stat. Ann.* § 2A:159A-3 and 5. Article III(c) requires the warden to inform the prisoner of "any detainer" irrespective of its underlying basis and of "his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." Since this provision omits the word "untried" and applies to all detainers, it is evident that the legislature was not espousing a strict and narrow construction of the terms "indictment, information or complaint."[11] Article III(e) compels the pris-

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[11] The development of the law has shown that the terms "untried complaint" and "trial" have never had a static meaning. A complaint, unlike an indictment or information, has an elastic definition. A complaint, for example, is defined in the *Federal Rules of Criminal Procedure* as "a written statement of the essential facts constituting the offense charged." *Fed. R. Crim. P.* 3. Since a probation violation complaint is a "written statement . . . constituting the offense charged," it is a "complaint" within the meaning of the rules and is "untried" until it has been adjudicated and a final judgment entered.

Similarly, a parallel has been drawn between a "trial" and a revocation hearing for purposes of determining the rights of an accused. *Moody* v. *Daggett*, 429 U.S. 78, 90 (1976) (Stevens, J. and Brennan, J., dissenting). Additionally, the Ninth Circuit Court of Appeals has held that the term "trial" within Article III of the Interstate Agreement on Detainers includes sentencing as well as trial on the merits. *Tinghitella* v. *State of California*, 718 F. 2d 308, 311 (9th Cir. 1983). "Both the rehabilitative and fair treatment purposes of the IAD would be better effectuated by construing trial to include sentencing. A prisoner with foreknowledge of a time certain for imprisonment in the receiving state (here, California) presumably will more easily undergo rehabilitation than one with knowledge merely of the range of possible sentences." *Id.* n. 5 at 311. *Contra*, *Gaches* v. *Third Judicial Dist.*, 416 F. Supp. 767 (W.D. Okla. 1976); *People* v. *Randolph*, 85 Misc. 2d 1022, 381 N.Y.S. 2d 192 (Sup. Ct. 1976).

oner to appear, while in the receiving State, in any Court where his presence may be "required to effectuate the purposes of the Agreement." *N.J. Stat. Ann.* § 2A:159A-3(e). Since the resolution of a probation violation complaint effectuates the purpose of the Agreement, a detainer based upon such a charge falls within the ambit of Article III(e). *Id.*

Article V(d), which establishes procedural machinery for implementing, and imposes sanctions for violating, Articles III and IV, permits prosecution in the receiving State of "*any other charge* or *charges* arising out of the same transaction" (emphasis added) that leads to filing of a detainer based upon an untried indictment, information or complaint. *N.J. Stat. Ann.* § 2A:159A-5(d). Since a probation violation complaint can arise out of the same criminal transaction that gives rise to an indictment, information or complaint, Article V comprehends probation violation charges.[12]

The interpretation of the phrase "untried indictment, information or complaint" advanced by the petitioners

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[12] Article V(d) provides:

> The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charges contained in 1 or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

Since Article V(d) includes on its face probation violation complaints, it would be ludicrous to suppose that Article III does not. Moreover, a prisoner in State A who is both indicted and charged with a probation violation complaint in State B would be entitled to dispose of the detainers on both charges. Under the petitioners' construction, a

cannot be reconciled with the clear statement that the statute applies to "all charges outstanding against a prisoner" and is primarily designed to dispose expeditiously of detainers. *N.J. Stat. Ann.* § 2A:159A-1. This position also produces anomalous results that the legislature could not have intended.[13] Because an interpretation of a statute that defeats its manifest object must defer to one that harmonizes the act as a whole, this Court must affirm the Third Circuit Court's interpretation of the statute.

B. The Legislative History Of The Interstate Agreement On Detainers Supports The Interpretation Of The Statute Adopted By The Third Circuit Court Of Appeals.

Even if the statutory language did not compel the conclusion that Article III of the Detainer Agreement includes probation violation complaints, the legislative history of the Agreement would do so. The plain meaning rule is "rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if its exists." *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928). Chief Justice Marshall long ago observed that "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . ." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 355, 384 (1804).

The relevant legislative history can be found in documents prepared under the auspices of the Council of State

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prisoner in State A who is charged merely with a violation of probation in State B would not be entitled to invoke the provisions of the Interstate Agreement on Detainers. A statutory construction that leads to such an anomalous result must be eschewed in favor of one that gives meaning to the parts as well as the whole. *See, American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

[13] *See*, n. 12, *supra*.

Governments. *United States* v. *Mauro*, 436 U.S. 340, 349-356 (1978). The federal legislative history is less instructive because "Congress enacted the Agreement into law . . . with relatively little discussion and no apparent opposition." *Id.* at 353.

In 1948, at the instance of the Parole and Probation Compact Administrators' Association, a Joint Committee on Detainers was formed to deal with the administrative problems arising from the use of detainers.[14] At the time the Committee was formed, the existing detainer system was unregulated and fraught with problems both for law enforcement officials and inmates. The cavalier filing of detainers and the bitter consequences they engendered caused one commentator to observe that "[t]he use of detainers . . . must be branded a vestigial remnant of the age-old concept of retributive justice. No purpose is served except the destructive expression of a primitive urge for vengeance." Bennett, *The Last Full Ounce*, 23 Fed. Prob. 20 (June 1959).

[14] In addition to representation from this group, the Committee included members from the National Association of Attorneys General, the Section on Criminal Law of the American Bar Association, the National Conference of Commissioners on Uniform State Laws and the American Correctional Association. In 1955 and 1956, the Committee was reconstituted under the auspices of the Council of State Governments and membership was augmented to include representation from the National Probation and Parole Association, the National Association of County and Prosecuting Attorneys and the United States Department of Justice. Council of State Governments, *Suggested State Legislation, Program for 1959*, 167 (1958).

The Joint Committee recommended the adoption of the following "guiding principles":

> I. *Every effort should be made to accomplish the disposition of detainers*[15] *as promptly as possible.* This is desirable whether the detainer has been filed against an individual who has not yet been imprisoned or against an inmate of a penal institution. Prompt disposition of detainers is a proper goal whether the detainer has been filed by a *local prosecutor, a state prison, a parole board, or a federal official.* Detainers lodged on suspicion should not be permitted to linger without action.
>
> II. There should be assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released . . .
>
> III. *Prison and parole authorities should take prompt action to settle detainers which have been filed by them.* Prison officials and parole boards recognize that detainers create serious problems with respect to prisoners under their jurisdiction. Therefore, when such authorities file detainers against prisoners in other jurisdictions, they should cooperate fully to effect a prompt settlement of all detain-

[15] The Council defined a detainer as

> a warrant filed against a person already in custody with the purpose of insuring that he will be held for the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state; or where a man not previously imprisoned commits a series of crimes in different jurisdictions.

Council of State Governments, *Suggested State Legislation, Program for 1956*, 60 (1955). Such a broad definition clearly encompasses detainers based on probation violation complaints.

ers. They should promptly give notice as to whether they insist that the prisoner be returned at the end of his present sentence, or whether they will agree to a concurrent parole. Every effort should be made to cooperate in planning effective rehabilitation programs for the prisoner.

IV. *No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made and it has been found valid.* It should be the duty of prison officials, parole authorities and judges to make such investigations before denying the prisoner privileges, probation or parole, or before imposing unusually heavy sentences upon the prisoner.

V. All jurisdictions should observe the principles of interstate comity in the settlement of detainers, and each should bear its own proper burden of the expenses and effort involved in disposing of charges and settling detainers. There should be full faith and credit given to the rights of any state or jurisdiction asserting them.

Council of State Governments, *Suggested State Legislation, Program for 1956*, 61-62 (1955) (emphasis added). Although these principles were non-binding, they were meant to serve as a code of conduct for prosecutors, courts and prison officials "to the end that detainers [would] not hamper the administration of corrections programs and the effective rehabilitation of criminals." *Id.* at 61.

Later reconstituted under the auspices of the Council of State Governments, the Committee drafted several proposals concerning detainers. The central preoccupation of the drafters of the Agreement was the negative psychological impact of the detainer upon a prisoner and the adverse effect upon programs of prisoner treatment and rehabilitation, particularly with respect to the

impediment detainers placed upon the corrections official's ability to plan and administer these programs. The drafters perceived that the uncertainty the detainers cast over the prisoner's future undermined the incentive for self-reform and permanently embittered the offender against society. The practice of allowing a detainer to pend unresolved for a period of years reinforced the impression that society was going to "absurd lengths to inflict the maximum misery upon the prisoner." Bennett, *The Last Full Ounce*, 23 Fed. Prob. 20, 21 (June 1959) The Council observed:

> The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated.

Council of State Governments, *Program for 1956* at 60. Thus, it was primarily to correct the adverse effects of detainers upon prisoners and corrections officials that the Agreement was drafted. *United States* v. *Mauro*, 436 U.S. at 360.[16] Since a detainer based upon a probation

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[16] The decision in *Mauro* supports this view. Writs of *habeas corpus ad prosequendum* issued by a federal court are immediately executed and, therefore, "enactment of the Agreement was not necessary to achieve their expeditious disposition." *Mauro*, 436 U.S.

violation complaint causes the same adverse effects as a detainer based upon any other charge, it is consistent with the legislative history to conclude that the drafters intended probation violation detainers to fall within the intendment of the Agreement.

Petitioners misconceive the fundamental function of the Agreement as a reform measure when they claim that the act only guards against the filing of "nuisance" detainers whose supporting charges are completely unsubstantiated. Because a probation violation detainer based upon conviction of another crime can never be frivolous, the petitioners contend that it is perfectly permissible to leave it unresolved for an infinite number of years. There is absolutely nothing in the legislative history or the Agreement itself to support this argument. The entire thrust of the guiding principles and the broad purposes expressed in Articles I and IX compel a conclusion that a probation violation complaint should be subject to a prompt resolution within the purview of the Agreement.

While the explicit purposes of the Agreement are clearly rehabilitative, it has nevertheless come to be recognized that the Agreement has collateral consequences on a prisoner's right to speedy trial. However, these consequences were not the primary focus of the act; they cannot be invoked to thwart the legislative intent and exclude detainers based upon probation violation complaints from the protections conferred by the Agreement. In 1957, "when the detainer statute was drafted and first published, a prison inmate's constitutional right to a speedy trial had not yet been clearly established." Yack-

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at 360. "The adverse effects of detainers that prompted the drafting and enactment of the Agreement are thus for the most part the consequence of the lengthy duration of detainers." 436 U.S. at 360.

le, *Taking Stock of Detainer Statutes*, 8 Loyola L.A. L. Rev. 88, 110 (1975). At that time, "the problems associated with detainers were seen as administrative, involving substantial difficulties for inmates but not rising to constitutional significance." *Id.* at 110. The petitioners' thesis that the Agreement was designed to effectuate speedy trial rights misreads the legislative history. Therefore, petitioners' argument that the provisions do not extend to probation violation complaints because they do not implicate speedy trial rights must fail.

Although it is obvious that the enactment of the statute by the federal government directly followed this Court's decisions in *Klopfer* v. *North Carolina*, 386 U.S. 214 (1967) and *Smith* v. *Hooey*, 393 U.S. 374 (1969), Congress did not enact the statute, as the legislative history shows, solely to protect speedy trial rights. In 1970, when the federal government and the District of Columbia adopted the Agreement both the House and Senate Reports stated that:

> *The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action.* He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to

develop a sound pre-release program. (emphasis added)

S. Rep. No. 91-1356, 91st Cong. 2nd Sess.; H.R. Rep. No. 91-1018, 91st Cong. 2nd Sess. reported in 1970 U.S. Code Cong. & Ad. News 4864, 4866. As this Court has stated "[t]he reference in the Committee Reports to the recommendations of the Attorney General . . . indicates that Congress was motivated, not only by the desire to aid States in obtaining federal prisoners, but also by the desire to alleviate the problems encountered by prisoners and prison systems as a result of the lodging of detainers." *United States* v. *Mauro*, 436 U.S. at 356.[17]

In the discussion leading to passage of the Agreement in the House of Representatives, a sponsor of the bill, Richard H. Poff from the State of Virginia, remarked:

> . . . if a defendant is uncertain as to whether he will have to serve another jail term he is less likely to have the motivation to become successfully rehabilitated. *This latter consideration is especially important in view of the fact that the basic purpose of the entire penal system is to prepare its inmates to reenter society as law-abiding citizens.* (emphasis added)

H.R. 6951, 91st Cong., 2nd Sess., 116 Cong. Rec. 13997, 14000 (1970). Representative Poff concluded ". . . in view of these considerations, I feel that the Interstate Agreement on Detainers benefits both defendant and prosecutor, as well as society generally." *Id.* As the above discussion of the legislative history reveals Congress was well aware of the drafters' primary purpose to alleviate the adverse effects of detainers, while simultaneously recognizing the potential of the statute to have some impact upon effectuating a prisoner's right to speedy trial.

The Third Circuit Court of Appeals deduced from the legislative history that the "drafters of Article III were concerned with the need to settle outstanding charges against prisoners in order to enable the prisoners to participate in rehabilitation programs." *Nash* v. *Jeffes*, 739 F. 2d at 882. The Agreement was primarily designed to safeguard prisoner rights and it is totally consistent with legislative intent to construe the Agreement to apply Article III to detainers based upon probation violation complaints. Contrary to petitioners' assertion, the Third Circuit Court of Appeals did not legislate new policy, but merely carried out the intent expressed in the statutory language and legislative history.

C. Application Of Article III To Probation Violation Complaints Effectuates The Legislative Policies Of The Detainer Agreement.

Petitioners claim that application of Article III to probation violation detainers does not result in any of the benefits the legislature intended the Agreement to have because of the nature of the probation violation charge.

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[17] A further indication that Congress did not view the Agreement as a mechanism designed primarily to protect a defendant's right to a speedy trial is the passage of the *Speedy Trial Act of 1974*, 18 U.S.C.A. § 3161(j) (West Supp. 1984). This Act places an affirmative obligation upon the United States Attorney to take steps promptly to obtain a prisoner for trial once he learns of his place of incarceration and thereby rectifies what commentators had long recognized to be a significant weakness of the Agreement's ability to implement speedy trial rights. See also the ABA Report on Standards for Criminal Justice, *Standards Relating to Speedy Trial* § 3.1 (1967) which places the same burden on the prosecutor.

It is clear, therefore, that to the extent the Agreement applies to detainers based on all charges it accords defendants rights greater than those afforded by the speedy trial guarantee of the Constitution. On the other hand, because the Agreement does not require a prosecutor to file a detainer, its speedy trial protections are inadequate.

To arrive at this conclusion petitioners wrongly assert that each and every possible disposition of a probation violation detainer will have no beneficial effect upon the prisoner and the administration of correctional programs. However, as the Third Circuit Court of Appeals correctly observed "[a] quick adjudication of the charges underlying a detainer is desirable, not only to vindicate a prisoner's constitutional right to a speedy trial, but also to provide certainty as to the time of his scheduled release, in order to aid in his rehabilitation." *Nash* v. *Jeffes*, 739 F. 2d at 883.

Restrictions are placed upon inmates against whom a detainer is lodged under the assumption that they pose a greater escape risk than other inmates since they face the possibility of serving a future sentence of unknown duration. Note, *Detainers and the Correctional Process*, 4 Wash. U.L.Q. 417, 419 (1966). These restrictions are placed upon inmates routinely and regardless of the nature of the charge underlying the detainer. *Id.* at 419. The presence of the detainer generates uncertainty about the prisoner's future by leaving unresolved the terms of any future sentence that may eventually be imposed. This uncertainty affects both prisoner and corrections official alike. The former suffers the anxiety and depression from the threat of having to serve a consecutive term; the latter the inability to design a program of effective treatment not knowing the prisoner's certain release date. To ascertain the release date at the most efficacious time, ". . . charges underlying detainers [should] be finally adjudicated at the beginning, rather than the end, of the sentence." *Nash* v. *Jeffes*, 739 F. 2d at 883.

Resolution of detainers based upon probation violation complaints fulfills the beneficial aims of the act. A court exercises a wide latitude of discretion at a probation

revocation proceeding; indeed, the court may elect not to revoke probation, or to impose any sentence that could have been imposed at the original time of sentencing. *N.J. Stat. Ann.* § 2C:44-5(c). Although conviction of a crime while on probation raises a presumption that probation will be revoked, it does not restrict the court's discretion. *State* v. *Serio*, 168 N.J. Super. 394, 403 A. 2d 49 (Super. Ct. Law Div. 1979). Where the new conviction is for a minor offense revocation may not be warranted. Abramson, *Criminal Detainers*, 86 (1979). Moreover, the court is at liberty to impose either concurrent or consecutive sentences. *N.J. Stat. Ann.* § 2C:45-3(b). Should a concurrent sentence be imposed it would alleviate the restrictions placed upon the inmate.[18]

Early adjudication of the charge also enables the court to base its decision on fresh evidence. Not all probation violation detainers will be based upon the out-of-state conviction.[19] Cases involving technical charges of non-

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[18] The New Jersey Department of Corrections Standard relating to eligibility criteria for reduced custody consideration provides:

D. Detainers, Open Charges Bail

A detainer is a warrant for formal authorization to hold an inmate for prosecution or detention by federal, state or out-of-state law enforcement agencies.

Inmates, with detainers from federal authorities or other states shall be eligible to be considered for gang minimum and full minimum custody status, *provided* the detainers are for concurrent sentences which do not exceed the maximum of the term currently being served.

N.J. Dep't of Corrections, Standard 853.5D (April 11, 1983).

[19] Detainers of this sort are not uncommonly placed. *See, e.g. Padilla* v. *State of Arkansas*, 279 Ark. 100, 648 S.W. 2d 797 (1983). While Padilla was serving a sentence in California for an unrelated crime, Arkansas placed a detainer against him based upon an alleged failure to report to his probation officer. The petitioners' reliance upon *Padilla* ironically disproves their thesis that a detainer based upon a technical violation is unlikely to be encountered.

compliance with the terms of probation may require the testimony of live witnesses. A delay in the proceeding results in the fading of memories, loss of witnesses, or essential evidence, exactly the same concerns that underlie a prisoner's constitutional right to a speedy trial, and thereby deprives the inmate of an effective defense when the hearing is held at a later date. The Third Circuit found this distinct possibility serious enough to warrant speedy disposition. *Nash* v. *Jeffes*, 739 F. 2d at 882.[20]

In the probation violation setting, delay in disposition forces a consecutive sentence and offers no benefits to either the prisoner or the State. Since there is no mechanism by which to apply the sentence on the probation violation retroactively, if the Agreement is held not to apply to probation violation complaints, a judge would never be able to impose concurrent sentences and the prisoner would be denied the ensuing benefit. The State that lodges the detainer would incur the expense of incarcerating the prisoner for the additional term. The State that has custody of the prisoner while the detainer

[20] Petitioner Department of Corrections distorts the Third Circuit opinion when it asserts that the Circuit Court "acknowledged" that a prisoner's interest in an early adjudication does not "outweigh the administrative burden and expense to the state in conducting the revocation hearing prior to completion of the out-of-state sentence." (Brief for petitioner Department of Corrections at 27). All the court did was to note that conviction of a new crime is *prima facie* proof of the probation violation. It made no suggestion that this type of violation should preclude a prisoner from an early adjudication of the detainer because of the administrative burden and expense to the State. To the contrary, the Court stated that the cost of an additional trip, given the burdens the detainer placed on the prisoner, did not outweigh the prisoner's interest in quick adjudication irrespective of the nature of the probation violation. *Nash* v. *Jeffes*, 739 F. 2d at 883.

is pending would bear the additional expense of keeping the prisoner in its maximum security facility since prisoners with detainers lodged against them are perceived as escape risks.

The supposed advantage to delay, that of affording a more informed decision to be made at the revocation hearing based upon the inmate's record of progress, is simply not attainable in the interstate setting. *Cf. Moody* v. *Daggett*, 429 U.S. 78, 89 (1976).[21] A court sitting in a jurisdiction other than the one where the prisoner is incarcerated is not in a position to follow the inmate's

[21] Although this Court has determined that a prisoner does not have a constitutional right to a prompt parole violation hearing in the intrastate setting, *Moody* v. *Daggett*, 429 U.S. 78 (1976), and several lower courts have determined that this right does not exist in the interstate setting when different and autonomous parole authorities are involved, *United States ex rel. Caruso* v. *United States Board of Parole*, 570 F. 2d 1150 (3rd Cir. 1978), *cert.* denied, 436 U.S. 911 (1978), it does not follow that a prisoner neither has a constitutional right to a prompt probation revocation hearing in the interstate setting, nor a statutory right to one under the Agreement. In *Moody*, this Court expressly reserved the determination of whether the potential of adverse actions by different and autonomous parole boards would warrant a different conclusion, and this possibility remains distinctly open in spite of lower court rulings. 429 U.S. at 88. Additionally, no lower court has made a specific determination as to whether a constitutional right to a prompt probation violation hearing would be recognized in the interstate setting since probation raises concerns that are not present in parole violation proceedings. Moreover, statutes may always confer greater rights upon individuals than those that are recognized under the federal or state constitutions which merely reflect the bare minimum level of rights accorded to all. *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974). In this respect, the Agreement gives effect to the legislatively created right to serve a prison sentence unencumbered by the adverse effects of detainers.

progress at the institution and, therefore, not in a position to make a more informed decision about revocation at the end of the outside term. Rather, the delay deprives the court of the opportunity to integrate its sentence with that of the other jurisdiction and, thus, directly contravenes the intent of the drafters. Council of State Governments, *Program for 1956* at 60.

In the interstate setting, delay hinders rather than furthers any legitimate state interest. It creates a backlog of cases and promotes a system of deciding cases on the basis of stale evidence. It is not even clear that the cost of the "return trip," which would be incurred by the State if the Agreement is interpreted to apply to probation violation detainers, exceeds the cost of delaying the hearing until the expiration of the intervening sentence. Because the operative provisions of the Agreement can be so readily applied to dispose of detainers based on charges of probation violation, applying the Agreement to probation violation detainers would not impose any significant administrative or financial burdens upon the State.[22]

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[22] Article III requires a prisoner to deliver his demand for final disposition of the charge underlying the detainer to "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction." *N.J. Stat. Ann.* § 2A:159A-3(a). This notice requirement correctly informs those with jurisdiction over a probation violation complaint of the prisoner's request for final disposition of the detainer.

In 1970, the Center for Criminal Justice at Harvard Law School undertook a detailed study of the detainer system at four major prisons of the Commonwealth of Massachusetts. Dauber, *Reforming the Detainer System: A Case Study*, 7 Crim. L. Bull. 669, 673 (1971). Approximately 10 percent of the records of all inmates in those prisons were reviewed and analyzed. *Id.* at 673. It was found that of the 202 inmates studied in the sample population, a total of 108 detainers had been lodged against them at some time during their present incarceration. *Id.* at 675. It was further found that only 19 percent (21 detainers) of the total number of detainers in the sample were based on parole and probation violation charges. *Id.* at 676. This figure represented the smallest percentage of detainers identified by the Center's study with the exception of those detainers grouped in the "miscellaneous" category. The results of this study, the first and apparently only empirical study of the detainer system, contrast sharply with and suggest that the estimate of the *Amici* Attorneys General that a significant number of the 27,177 persons wanted nationally for probation violations are likely to be inmates against whom probation violation detainers are pending is grossly mistaken. (Brief for *Amici* Attorneys General at p. 6)

The Third Circuit Court of Appeals correctly rejected a narrow and technical interpretation of the Agreement. In so doing, the Court avoided a construction of the statute that would defeat the very purposes for which it was enacted. By adopting an interpretation that fulfills the statute's aims, the Court properly met its judicial responsibilities to effectuate legislative intent.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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On Writ of Certiorari
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BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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This brief is filed pursuant to Rule 36.2 of this Court. Consent to file has been granted by James J. Ciancia, Esq., Assistant Attorney General for the State of New Jersey, Counsel for Petitioner in No. 84-835, by Philip S. Carchman, Esq., Mercer County Prosecutor, Counsel for Petitioner in No. 84-776 and by John Burke, Esq., Assistant Deputy Public Defender for the State of New Jersey, Counsel for Respondent.

INTEREST OF THE AMICUS CURIAE

The Post-Conviction Assistance Project (P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. Since its establishment in 1971, P-CAP has advocated respect for the often ignored rights of those confined in our nation's prisons. Despite waning student concern for public interest law and budgetary constraints that severely limit such efforts, P-CAP members interview arrestees daily in preparation for bail hearings, help prisoners with problems navigate the corrections bureaucracy, visit youths at a local juvenile home, and answer requests for legal materials from pro se inmate litigants. Pursuant to third-year practice rules, P-CAP members represent prisoners in federal habeas corpus and civil rights suits before Uni-

ted States District Courts and the United States Court of Appeals for the Fourth Circuit.

P-CAP receives its funding from the University of Virginia Law School Foundation, from the University of Virginia Student Council, and from private donations. It has no financial interest in the outcome of this case.

P-CAP's interest as amicus curiae arises from its experience working with inmates from all over the country. This experience has made P-CAP aware of the harm detainers do to inmate rehabilitation and of the benefits that the Interstate Agreement on Detainers (IAD) has produced for inmates and society at large. Prompt disposition of detainers under the IAD encourages effective rehabilitation and fair resolution of the warrants underlying detainers. The concern of the amicus

curiae is that IAD be interpreted in accord with legislative policy to provide for prompt resolution of all major types of detainers.

SUMMARY OF ARGUMENT

A state is never compelled to place a detainer on an inmate. If a state wishes to obtain custody of an inmate without placing a detainer it may do so via the

extradition process. Detainers impose a severe burden on inmates' and society's interests in rehabilitation -- a burden that the Interstate Agreement on Detainers (IAD) is designed to reduce. When a state chooses to damage rehabilitation by placing a detainer, then the detainer should be subject to the IAD, so that the harm may be mitigated in accordance with legislative design.

Applying the IAD to parole and probation detainers will result in some additional costs for the states. However, probation and parole detainers burden rehabilitation in exactly the same way detainers based on criminal indictments do. Both classes of detainers, identical in effect, should be subject to the same rules. In that way, a state will not be encouraged to place parole and probation detainers that it never intends to prosecute, thereby pun-

ishing an inmate at the expense of society and a sister state.

Of course, a state may avoid the costs of the detainer system entirely by not filing a detainer. Furthermore, few prisoners are likely to take advantage of the opportunity to have prompt revocation hearings, because it will often be to a prisoner's advantage to delay a decision.

Prompt disposition of parole and probation violation detainers serves the purposes of the IAD. And the cost objections raised to applying the IAD to these detainers are not substantial. Therefore, it is highly unlikely that the drafters of the IAD and the legislators who enacted it meant to exclude parole and probation violation detainers from the IAD's mechanisms. The Court of Appeals correctly found, consistent with legislatively-established policies, that the general lan-

guage of the IAD should be interpreted to place probation and parole detainers within the mechanism of the IAD's Article III. Nash v. Jeffes, 739 F.2d 878 (3d Cir. 1984), cert. granted, 105 S. Ct. 902 (1985).

ARGUMENT

I. THE BROAD LANGUAGE OF THE INTERSTATE AGREEMENT ON DETAINERS INCLUDES PAROLE AND PROBATION VIOLATION DETAINERS.

The Interstate Agreement on Detainers, N.J. Rev. Stat. §§ 2A:159A-1 to -9 (1971), (hereinafter the IAD or the Agreement) was drafted in 1956 by the Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses. The committee met under the auspices of the Council of State Governments. See Council of State Governments, Suggested State Legislative Program for 1957, at 74-85 (1956). The Agreement was the culmination

of a process that began eight years before, when the Joint Committee on Detainers, the forerunner of the committee that drafted the IAD, first met and began searching for a way to reduce the harm to society and to prisoners caused by detainers' interference with rehabilitation. See Council of State Governments, The Handbook of Interstate Crime Control 85-91 (1949). With this Court's decision in Smith v. Hooey, 393 U.S. 374 (1969), establishing constitutional speedy trial rights for state prisoners serving time for other crimes, the IAD began to serve the purpose of protecting prisoners' constitutional right to a speedy trial.

The committee that drafted the IAD was faced with a serious problem. The evils of the detainer system had received substantial attention, but it was apparent that voluntary cooperation between the

states was not effective in controlling abuse in the system. See Council of State Governments, Suggested State Legislative Program for 1957, at 74-76. The committee met only four times, twice in 1955 and twice in 1956. Id. They produced an imperfectly drafted statute. As this Court observed when it decided United States v. Mauro, 436 U.S. 340 (1977), the drafters even neglected to define the word "detainer." Nevertheless, the drafters achieved a balance of fairness between the interests of prisoners and society in rapid disposition of charges and the need for a manageable and efficient system for interjurisdictional transfers of inmates.

The language of the IAD sheds limited light on whether Article III of the Agreement was meant to cover detainers based on

parole and probation violations.[1] Article I states:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints ... produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints.

N.J. Rev. Stat. § 2A:159A-1 (1971) (emphasis added). Article III repeats this language in a slightly different form: "[W]henever during the continuance

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[1]The Court of Appeals did not consider the issue of whether a parole violation detainer should be subject to the IAD. Nash v. Jeffes, 739 F.2d 878, 883 n.11 (3d Cir. 1984). However, this Court, in granting the writ of certiorari, indicated an intention to address this issue. 105 S. Ct. 902 (1985). Accordingly, amicus curiae will address both probation and parole violation detainers.

of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days [of completing proper notice procedures]." N.J. Rev. Stat. § 2A:159A-3 (1971). Whether this language includes parole and probation violation detainers is not immediately clear without reference to the legislatively-established purposes of the IAD.

Nevertheless, the above-emphasized language from Article I, using the word "charges" to describe the scope of the Agreement, would seem to encompass parole and probation violation detainers. Article III, in dropping that language, might be seen as inexplicably narrowing the kinds of detainers meant to be encom-

passed by the IAD. However, since the language is unclear, consideration of the legislative purposes of the Agreement indicates that the language of Article I shall control. Nash v. Carchman, 558 F. Supp. 641, 644 (D.N.J. 1983), aff'd sub nom. Nash v. Jeffes, 739 F.2d 878 (3d Cir. 1984), cert. granted, 105 S. Ct. 902 (1985). Article IX of the Agreement mandates that courts interpret the IAD "so as to effectuate its purposes." N.J. Rev. Stat. § 2A:159A-9 (1971). Those purposes are laid out in the language of Article I, demonstrating that the drafters intended that language to control questions of the IAD's interpretation.

The legislative history of the IAD supports the view that parole and probation violation detainers are subject to the provisions of Article III. The Council of

State Governments' description of the IAD includes a definition of the word detainer which explicitly includes parole violation detainers:

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. ... Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state.
>
> Council of State Governments, Suggested State Legislative Program for 1957, at 74 (emphasis added).

To look at the question from another angle, reading the language "indictment, information or complaint" as strictly limiting the application of Article III produces unsatisfactory results. In Virginia, for example, a grand jury is entitled to indict an individual of its own

accord, without the participation of the prosecutor. Va. Code § 19.2-216 (1983). This form of process is called a "presentment." A strict reading of this language would exclude detainers based on presentments from the mechanism of Article III, although such detainers, like those based on probation and parole violations, are plainly within the legislative rationale for the Agreement.

Equally unsuitable results will occur if the words "untried" and "trial" from Article III are read to support the inference that only detainers based on criminal charges are covered by Article III. For example, under this reading a prisoner who used the IAD to clear an outstanding charge and then was diverted from trial with the opportunity of having the charges dropped in the future might later attack the charge by arguing that the IAD re-

quired that he be brought to trial. Again, Article I helps with this problem by speaking more accurately of the "disposition" of outstanding charges.

Even if the language "indictment, information or complaint" is read to somehow narrow the applicability of Article III, it is itself broad enough to encompass parole and probation violation detainers. The words indictment and information have well-understood, technical meanings. The word complaint, however, has a broader meaning. Nash v. Carchman, 558 F. Supp. at 643-44. It is part of our everyday vocabulary as a generic term for all kinds of criminal charges.

II. THE LEGISLATIVE HISTORY AND PURPOSES OF THE IAD DEMONSTRATE THAT PAROLE AND PROBATION VIOLATION DETAINERS ARE SUBJECT TO ARTICLE III.

As the Court of Appeals in this case pointed out, the courts that have reached

the conclusion that parole and probation violation detainers are not subject to Article III of the Agreement did not give adequate consideration to the legislatively-mandated purposes of the IAD. Nash v. Jeffes, 739 F.2d 878, 882 (3d Cir. 1984), cert. granted, 105 S. Ct. 902 (1985).[2] These decisions are in direct contrast to the approach this court has previously taken in IAD cases. In both Cuyler v. Adams, 449 U.S. 433 (1981), and United States v. Mauro, 436 U.S. 340

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[2]An example of the overly narrow approach criticized by the court in Nash occurs in United States v. Roach, 745 F.2d 1252, 1253 (9th Cir. 1984). The court in Roach refused to look at the legislative history of the IAD, although this Court has stated "[w]hen aid to construction of the meaning words, as used in the statue, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940).

(1978), this Court conducted an "analysis of the purposes of the agreement and the reasons for its adoption" before reaching a decision. See Cuyler, 449 U.S. at 447-50; Mauro, 436 U.S. at 349-50, 359-61.[3]

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[3]Cuyler v. Adams, 449 U.S. 433 (1981), held that the IAD presents a federal question under 42 U.S.C. §§ 1981, 1983 (1982). This court has not addressed the issue of whether federal habeas corpus relief under 28 U.S.C. § 2254 (1982) is available for Article III violations. Amicus curiae believes that such relief should be available. However, there is considerable division of opinion among the courts of appeals on the extent of federal habeas corpus relief available for IAD violations. For illustrative cases see Hopper v. United States Parole Comm'n, 702 F.2d 842, 846 n.3 (9th Cir. 1983) (relief available under 28 U.S.C. §§ 2241, 2254, 2255 (1982) for violations of Article III(a)); Cavallaro v. Wyrick, 701 F.2d 1273, 1275 (8th Cir.), cert. denied, 103 S. Ct. 3120 (1983) (relief available under § 2241 for failure to provide a pre-transfer hearing after an Article IV request); Johnson v. Williams, 666 F.2d 842, 844 n.1 (3d Cir. 1981) (relief available under § 2254 for violations of Article IV(e)); Bush v. Muncy, 659 F.2d 402, 409 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982) (relief not available under § 2254 for violations of Article IV(e)); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980)

A. The IAD Is Designed to Protect Society's and Inmates' Interests in Rehabilitation.

The primary purpose of the IAD, as stated in Article I, is to promote both society's and prisoners' interests in rehabilitation by providing an efficient mechanism for the disposition of outstand-

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[3] (cont'd) (relief available under § 2254 for violations of Article IV(c)); Fasano v. Hall, 615 F.2d 555, 558 (1st Cir.), cert. denied, 449 U.S. 867 (1980) (no relief available for IAD violations); Mars v. United States, 615 F.2d 704, 707 (6th Cir.), cert. denied, 449 U.S. 849 (1980) (relief not available under § 2255 for violations of Article IV (e)); United States v. Williams, 615 F.2d 585, 589-90 (3d Cir. 1980) (relief available under § 2255 for violations of article IV(e)); Hitchcock v. United States, 580 F.2d 964, 966 (9th Cir. 1978) (relief not available under § 2255 for violations of Article IV(e)); Echevarria v. Bell, 579 F.2d 1022, 1024-25 (7th Cir. 1978) (relief available under § 2254 for violations of Article IV(e)); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (relief not available under § 2255 for violations of Article IV(e)).

ing charges.[4] The legislative history of the Agreement conclusively establishes this purpose. The commentary accompanying the promulgation of the IAD by the Council of State Governments describes the evils of the detainer system:

> The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as

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[4] The IAD is not a statute designed to protect the constitutional right to a speedy trial. This Court's decision in Smith v. Hooey, 393 U.S. 374 (1969), played a role in the congressional ratification of the Agreement, but as this section demonstrates, the Congress was equally concerned with rehabilitation. There is no indication whatsoever that the statute was drafted with constitutional speedy trial considerations in mind. The drafting took place twenty years before constitutional speedy trial rights were extended to prisoners of the states. The IAD's usefulness in protecting speedy trial rights is a product of historical accident, not legislative design.

> trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment .... Instead, he often becomes embittered with continued institutionalization and the objective of the correction system is defeated.
> ....
> ... Ironically, society is the real loser in collecting its debt from the offender. Much money is spent in extra periods of imprisonment, and embittered offenders become recidivists, pyramiding the expense of law enforcement.

Council of State Governments, Suggested State Legislative Program for 1957, at 74.

Congress was also worried about the harm to rehabilitation as it considered the IAD. Two examples from the House of Representatives and Senate committee reports will suffice to demonstrate the congressional concern. (The reports are virtually identical.) The reports state, under the heading "The Need for the Legislation," that "[a]lthough a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound prerelease program." H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 3 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 3 (1970). A letter from Graham W. Watt of the Government of the District of Columbia included in both reports and urging ratification of the IAD explains:

> There is substantial agreement among prison authorities that the presence of outstanding detainers has an adverse psychological effect upon prisoners and substantially impedes the establishment of any meaningful rehabilitative program for them. Not only do prisoners against whom detainers have been lodged present greater behavioral and security problems, but the planning of any realistic treatment program involving parole, work release, training, continuing

> education, or other community-oriented activities becomes difficult, if not impossible.

H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 7 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 7 (1970). See also H.R. Rep. at 5; S. Rep. at 5 (letter from Deputy Attorney General Kleindienst).

B. Parole and Probation Violation Detainers Severely Damage Rehabilitation Efforts.

The legislative history demonstrates that the purpose of the IAD is to reduce detainers' destructive effects on rehabilitation. The harm to rehabilitation is caused by the severe deprivations an outstanding detainer visits upon an inmate:

> [T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons. . . .; (4) ineligible for

> trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle them to additional good time credits against their sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

Cooper v. Lockhart, 489 F.2d 308, 314 n.10 (8th Cir. 1973). These hardships are identical for detainers based on parole and probation violations and for those based on outstanding criminal indictments. L. Abramson, Criminal Detainers 85 (1979). Therefore, the harm to rehabilitation

caused by both classes of detainers is identical.

Since the purpose of the IAD is to mitigate the adverse effects of outstanding detainers on rehabilitation, and since the effects on rehabilitation of outstanding parole and probation violation detainers are identical to the effects of outstanding criminal indictment detainers, it is highly improbable that the drafters would have excluded parole and probation violation detainers from the mechanisms of the IAD.

C. There Is No Persuasive Justification for Excluding Probation and Parole Violation Detainers from the Mechanisms of the IAD.

The commonly advanced rationales for excluding parole and probation violation detainers from the provisions of the IAD are not convincing. There are two points to be kept in mind as these arguments are

examined. First, the IAD is a two-way street. It gives the prisoner a way to compel the state to provide for disposition of charges underlying a detainer, but under Article IV it also provides the state with a streamlined procedure for obtaining custody of the prisoner if it so desires. N.J. Rev. Stat. § 24:159A-4 (1971). In IAD cases the temptation is to focus too closely on the benefit that the Agreement provides to prisoners, and to lose sight of the benefits provided to states by efficient mechanisms for disposing of detainers and to society by more effective use of resources devoted to corrections.

Second, the state is never required to lodge a detainer against a prisoner. The state may obtain a parole or probation violator through the normal extradition process if it wishes to avoid the oper-

ation of the IAD. See N.J. Rev. Stat. § 2A:160-32 (1971). When a state places a detainer, it is aware of the severe consequences it will have for the inmate. It is fair that the state should then be subject to the IAD, which is designed to mitigate those consequences. This is particularly true when the state has another way to obtain custody of the inmate which avoids those consequences. As a Florida court pointed out in applying the IAD to a probation violation detainer, "[I]t is paradoxical for the State to attempt to utilize a detainer to insure Gaddy's presence following completion of his Georgia sentence, but to contend that it need not comply with procedural requirements imposed by the Detainers Act." Gaddy v. Turner, 376 So. 2d 1225, 1228 (Fla. Dist. Ct. App. 1979).

The primary objection raised by the State in this case is that including parole and probation detainers under the IAD will result in increased costs. The obvious response is to repeat that the State need not file a detainer at all, and may avoid any costs imposed by the IAD. If the state chooses to burden prisoners with detainers, it should bear the minor increase in administrative costs of keeping a closer watch on the detainer's status.

The objection, however, seems not to be to administrative costs, but to the increased costs of transporting prisoners to the jurisdiction in order to have hearings. That argument is flawed, unless a state never intends to pursue adjudication of the charges underlying these detainers. If a State is serious about pursuing a parole or probation violation charge, the

cost of bringing the prisoner to the jurisdiction must be paid.

If the prisoner requests disposition, a state must pay the cost of returning the prisoner after his hearing. That cost should be considered the "price" of placing a detainer. From the standpoint of the legislatively-established purpose of avoiding harm to rehabilitation, there is no distinction between parole and probation violation detainers and criminal indictment detainers. When a state chooses to place either type of detainer on an inmate, that state should bear an identical cost burden, since that state has imposed an identical burden on rehabilitation.

Applying the IAD to parole and probation violation detainers further prevents harm to rehabilitation by discouraging the filing of frivolous detainers. Raising

the cost issue is a way for the State to attempt to justify the abusive practice of placing detainers in order to punish the prisoner, and then withdrawing the detainer before having to bear the cost of bringing the prisoner to the jurisdiction for the hearings required by the due process clause of the Constitution. In this way the a State can punish an inmate for a parole or probation violation without ever having to provide or pay for the due process protections constitutionally mandated by this Court's decisions in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972).

That this abuse occurs regularly cannot be doubted. The legislative history of the IAD before the Congress points out that most state detainers placed on federal prisoners are withdrawn just before the federal sentence is completed.

H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 3 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 3 (1970). Evidence of this abuse is present throughout the IAD literature. As one article states, "[m]any detainers are filed for punitive reasons and are later withdrawn or not enforced, having served their purpose by curtailing prison privileges and preventing parole." Jacob & Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correction Process, 18 U. Kan. L. Rev. 494, 582 (1970); see also 11 Uniform Laws Annotated 322 (1968).

In any case, it is not likely that prisoners will flock to take advantage of the provisions of Article III if they are held applicable to parole and probation violations, so costs should not rise substantially. In the first place, in most

cases the conviction for which the prisoner is serving a sentence will be conclusive proof of the violation, so the prisoner may wait and hope the detainer is withdrawn. See Morrissey v. Brewer, 408 U.S. 471, 490 (1972). Furthermore, since an excellent institutional record is a valuable piece of evidence for the prisoner in his hearing, he may wish to wait if he feels his chance of avoiding revocation will be better after compiling such a record. Moody v. Daggett, 429 U.S. 78, 89 (1976). It will not be a substantial burden on the states to afford prompt hearings to those few prisoners who wish to try to settle the violation in order to have a better idea of when they might be released, or who feel they have a chance for imposition of a concurrent sentence.

While the amicus curiae have argued that both parole and probation violation de-

tainers are subject to the mechanism of Article III, there is an additional administrative cost associated with subjecting parole detainers to the IAD. Article III requires that notice be provided to the court and the prosecutor of a request for disposition of charges underlying a detainer. Parole charges are generally handled by state parole boards, so the notice requirements of the statute would require a state to provide a mechanism for transmitting notice to the appropriate authorities. That is not an overwhelming difficulty, however. For instance, Virginia law already requires that a Commonwealth's Attorney and Circuit Court become involved in parole revocations any time an attorney is appointed to represent the violator. Va. Code Ann. § 53.1-165 (1982).

A state is never required to place a detainer. However, if it chooses to burden an inmate with the penalties a detainer brings with it, then it should not begrudge the inmate the opportunity to dispose of the detainer by facing the underlying charges. In applying the IAD to parole and probation violation detainers, this Court would place no significant burdens on the states and would allow prisoners, if they so desire, promptly to face justice. The result benefits not only inmates, but also society, by protecting the opportunities for rehabilitation. It is difficult to believe that under these circumstances the drafters of the IAD and the legislators who enacted it could have meant to exclude parole and probation detainers from the mechanisms of the Agreement.

CONCLUSION

For the foregoing reasons, amicus curiae believes that this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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